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# FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

# FEDERAL COMMUNICATIONS COMMISSION

***Reed E. Hundt, Chairman**
**James H. Quello**
**Andrew C. Barrett**
**Ervin S. Duggan**

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***Reed E. Hundt designated Chairman effective November 29, 1993.**

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**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 90-106**

In re Applications of

| | |
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| INTERMART BROADCASTING GULF COAST, INC. | File No. BPH-880224MN |
| SOUTHWEST FLORIDA FM BROADCASTING, LTD. | File No. BPH-880303MG |
| Byron Douglas Kight & Mary Giglia Martinez Johnson d/b/a KIGHT BROADCASTING LIMITED PARTNERSHIP | File No. BPH-880303MH |
| PALM TREE FM LIMITED PARTNERSHIP | File No. BPH-880303MQ |

For Construction Permit for a
New FM Station on Channel 249A
Punta Rassa, Florida

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 17, 1993; Released: November 29, 1993**

By the Commission:

1. By this Memorandum Opinion and Order, we affirm the grant of the application filed by Kight Broadcasting Limited Partnership for a new FM Station at Punta Rassa, Florida.[1] Further comment is warranted with respect to certain matters raised by the parties in their Applications for Review.

2. *Intermart's Application:* Intermart argues that, pursuant to the remand order of the court in *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992), the Commission should hold this proceeding in abeyance pending the development of new policies for comparative broadcast hearings. This argument is without merit. In response to the Court's direction in *Bechtel* to further consider whether integration should continue to be used as a comparative criterion, we concluded that the circumstances raised in that case did not vitiate the integration criterion. *Anchor Broadcasting Limited Partnership*, 7 FCC Rcd 4566 (1992), modified 8 FCC Rcd 1674 (1993). At the same time, we initiated a rule making to reexamine the comparative criteria in light of "the passage of time and the dramatic changes that have occurred in the broadcast marketplace, in broadcast technology, and in the Commission's regulatory policies for broadcasting." *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664, 2664 ¶ 2 (1992). In *Reexamination of the Policy Statement*, 7 FCC Rcd at 2669 ¶ 41, and in *Anchor Broadcasting*, 7 FCC Rcd at 4568 ¶ ¶ 18-22 (1992) we concluded that the applicability of the revised criteria would be limited to applications not yet in hearing and that it would be inappropriate to defer action in licensing proceedings pending the development of new criteria.

3. In addition, Intermart was assessed a decisionally significant comparative diversification demerit (8 FCC Rcd at 2397 ¶ 3), and *Bechtel* did not question the Commission's diversification policies, but rather, as noted above, merely directed the Commission to "demonstrate why its focus on integration is still in the public interest." 957 F.2d at 881. Thus, the decisionally significant diversification demerit assessed against Intermart is still dispositive.[2]

4. *Kight Broadcasting's Integration:* Although Mary Johnson and Byron Kight, Kight Broadcasting's general partners, each have a 50 percent voting interest, they have agreed that, in the event of a tie vote, Byron Kight's vote will control. Southwest asserts that a 50 percent voting interest is a controlling interest because it conveys negative control. *Payne Communications*, 1 FCC Rcd 1052, 1061 ¶ 47 (Rev. Bd. 1986). It argues, *inter alia*, that, because the tie breaking procedure vitiates Johnson's negative control, she cannot have a legitimate 50 percent voting interest. According to Southwest, the facts that Byron Kight will be paid $3,000 a month as the station general manger while Johnson will only earn $1800 a month as director of news and community affairs, that Byron Kight has a 40 percent equity interest while Johnson only has a 20 percent equity interest, and that Johnson unlike Kight was not active in the prosecution of Kight Broadcasting's application, all contradict Kight Broadcasting's claim that Byron Kight and Johnson are co-equal partners with each having a 50 percent voting interest.

5. We agree with the findings of the Board that Johnson has been active in the applicant's affairs and will be fully integrated with managerial responsibilities into the operations of the proposed station, and that Kight Broadcasting was properly granted credit for her proposed integration.8 FCC Rcd at 2940-41 ¶ ¶ 15-20. Moreover, it is well estab-

[1] Now before the Commission are a Review Board Decision, *Intermart Broadcasting Gulf Coast, Inc.*, 8 FCC Rcd 2937 (Rev. Bd. 1993); Applications for Review filed June 1, 1993 by Intermart Broadcasting Gulf Coast, Inc., Southwest Florida FM Broadcasting, Ltd., and Palm Tree FM Limited Partnership; a Contingent Application for Review filed June 1, 1993 by Kight Broadcasting Limited Partnership; and Oppositions filed June 16, 1993 by Intermart, Southwest Florida, Palm Tree and Kight Broadcasting.

[2] Intermart also suggests that the Commission should develop policies which look to the full record to determine which applicant can more reasonably be relied upon to promptly construct and operate the proposed station. Intermart asserts that its non-integrated principal's record establishes that he is an experienced broadcaster who is most likely to promptly construct and initiate a new service. We do not agree that the experience of Intermart's non-integrated principal should be accorded any special weight. Moreover, Kight Broadcasting's principals are also experienced broadcasters who as integrated owners and managers will be able to utilize their backgrounds in connection with the construction and operation of their proposed station.

lished that the involvement of an owner with a controlling interest is not a bar to full credit for other owners with non-controlling voting interests. *Alexander S. Klein*, 86 FCC 2d 423, 430-31 (1981); *Eve Ackerman*, 7 FCC Rcd 2493, 2494 ¶ 5 (Rev. Bd. 1992), *review denied*, 7 FCC Rcd 6872 (1992). In addition, Commission policy is to grant credit for voting interests with power and authority to implement policy choices rather than to look to equity interests which do not have those attributes. *High Sierra Broadcasting Inc.*, 96 FCC 2d 423, 427 (Rev. Bd. 1983), *review denied*, 56 RR 2d 1394 (1984). Thus, in this proceeding, where Johnson is an experienced broadcaster who will be fully integrated into the management of the proposed station, the fact that she is not able to exercise negative control over the applicant's affairs is insufficient to warrant denial of integration credit for her voting interests.

6. ACCORDING, IT IS ORDERED, That the Applications for Review filed June 1, 1993 by Intermart Broadcasting Gulf Coast, Inc., Southwest Florida FM Broadcasting, Ltd., and Palm Tree FM Limited Partnership, ARE DENIED; and that the Contingent Application for Review filed June 1, 1993, by Kight Broadcasting Limited Partnership IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

ACCESS LONG DISTANCE,
Complainant,

v.

U S WEST COMMUNICATIONS, INC.,
Defendant.

File No. E-93-153

**ORDER**

**Adopted: November 19, 1993; Released: November 29, 1993**

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 30, 1993, Access Long Distance (Access) filed the above-captioned complaint against U S WEST Communications, Inc. (U S WEST) seeking damages resulting from U S WEST's alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990. On November 17, 1993, however, Access and U S WEST filed a joint motion to dismiss the complaint with prejudice stating that a mutually agreeable settlement of all pending controversies has been reached.

2. We are satisfied that granting the parties' motion to dismiss the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 90-571**

In the Matter of

Telecommunications Relay Services,
and the Americans with Disabilities
Act of 1990

**ORDER**

**Adopted: August 20, 1993; Released: November 29, 1993**

By the Acting Chief, Common Carrier Bureau:

## I. INTRODUCTION

1. This Order addresses the requests for suspension of enforcement of Section 64.604(a)(3) filed by U.S. West, BellSouth, Ameritech, NYNEX, Pacific Bell and Nevada Bell, United States Telephone Association, Bell Atlantic, Southern New England Telephone Company, AT&T, Rochester Telephone Corporation, United Telephone Companies and Central Telephone Companies, Southwestern Bell Telephone Company, Sprint, American Public Communications Council, GTE, and Cincinnati Bell Telephone. Those rules would require, *inter alia*, that telecommunications relay services (TRS) be capable of handling any type of call, including coin-sent paid calls. For the reasons stated herein, we suspend enforcement of the requirement that TRS shall be capable of handling coin-sent paid calls until July 26, 1995. At that time, we shall review whether such a service is technically feasible.

## II. BACKGROUND

2. In order to fulfill the mandate of the Americans with Disabilities Act of 1990 (ADA) that the Commission ensure that interstate and intrastate telecommunications relay services[1] are available, to the extent possible and in the most efficient manner to individuals in the United States with hearing and speech disabilities by July 26, 1993, the Commission, on November 8, 1990, initiated a rulemaking proceeding.[2] After considering extensive public comment, and the specific requirements of Title IV of the ADA,[3] the Commission adopted a Report and Order (*TRS Order*).[4] In the *TRS Order*, the Commission fashioned a comprehensive set of rules which set forth terminology and definitions of TRS, prescribed operational, technical, and functional minimum standards required of all TRS providers, and delineated the state certification process. On February 19, 1993, in an Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking (*TRS II*),[5] the Commission resolved five petitions for reconsideration, adopted a shared-funding mechanism for interstate TRS cost recovery, and proposed a specific plan establishing a TRS interstate cost recovery fund. On July 20, 1993, the Commission adopted a Third Report and Order (*TRS III*) which adopted rules implementing the TRS Fund, a shared-funding mechanism to recover costs caused by interstate TRS.[6]

3. In the *TRS Order*, the Commission concluded that in order to maintain the functional equivalency standard mandated by the ADA, TRS must be capable of handling any type of call normally provided by common carriers. *See* Section 64.604(a)(3) of the Commission's rules. Specifically, the Commission found no basis at that time for a general exclusion of coin-sent paid calls from the requirements of the ADA and charged the carriers with the burden of proving the infeasibility of handling any particular type of call. While petitioners stated that TRS was incompatible with coin-sent paid technology, they did not provide an analysis of infeasibility and, therefore, did not meet the heavy burden carriers have to prove infeasibility of providing a service readily available to voice telephone users.

4. As the implementation date for TRS approached, requests for suspension of enforcement of the coin-sent paid service requirement were filed by state TRS certification applicants[7] and other interested parties listed above. Under delegated authority, the Bureau granted 51 state TRS certification applications, and for good cause shown, suspended enforcement of the coin-sent paid service requirement until July 26, 1995.[8]

## III. CONTENTIONS AND DISCUSSION

5. In urging the need for a suspension of enforcement of the coin-sent paid requirements, petitioners contend that the Commission should exclude coin-sent paid calls (traditional coin service calls) from the mandatory minimum operational TRS standards because TRS is not currently

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[1] Telecommunications relay service (TRS) allows people with hearing and/or speech disabilities to use the telephone. TRS facilities are equipped with specialized equipment and staffed by communications assistants (CAs) who relay conversation between people who use text telephones and people who use traditional telephones.

[2] *See* Notice of Proposed Rulemaking, CC Docket No. 90-571, 55 Fed. Reg. 50037 (Dec. 4, 1990); 5 FCC Rcd 7187 (1990).

[3] *See* S.933, Pub. L. 101-336, 104 Stat. 327, 366-69 (July 26, 1990).

[4] Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Report and Order and Request for Comments, 6 FCC Rcd 4657 (1991) (*TRS Order*).

[5] Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking, 8 FCC Rcd 1802 (February 25, 1993), (hereinafter *TRS II*).

[6] Telecommunications Relay Services, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Third Report and Order, FCC No. 93-357 (July 20, 1993) (*TRS III*).

[7] 51 entities, including states, the District of Columbia, and Puerto Rico, filed TRS certification applications pursuant to Section 64.604 of the Commission's Rules. All entities filed requests for waiver or extension of time to comply with the coin-sent paid service requirement.

[8] *See* Public Notices dated July 8, 1993, July 21, 1993, and July 28, 1993.

connected to the Automated Coin Telephone System (ACTS) or the Traffic Operator Position System (TOPS), which are used for rating coin-sent paid calls on a "real-time" basis. In support of their contentions, petitioners state that a significant source of the technical difficulty of accommodating coin-sent paid text telephone calls[9] arises because TRS is a relay service that involves two connections: the first from the calling party to the relay center, and the second from the relay center to the called party. Consequently, petitioners aver, TOPS can only rate the first leg of the call because the connection to TOPS terminates once the coin deposit is made, and the TOPS switch is not in place to rate the second leg of service, the actual call to the recipient. Many commenters contend that the TOPS system cannot be configured to stay on the connection because once the Communications Assistant (CA) has obtained the number desired by the calling party, the new destination number would override the original dialed number (the TRS facility). Requests for additional coins cannot be channeled through TRS to the caller because the connection between the caller and TRS is broken when TRS dials the caller's recipient. Therefore, the call cannot be completed.

6. Petitioners assert that while coin-sent paid TRS calls are currently infeasible, they will work to find solutions to these technical problems. However, they submit that resolutions of these problems will take additional time. It appears that new technologies are being developed to solve technical pay text telephone problems, and that these technologies will be available within two years. We believe two years is an adequate period within which to perfect, and deploy, the required technology. Setting a timetable of two years will encourage the more rapid development of technology that fosters the availability of telecommunications services to the disabled. *See* Section 64.604(b)(5) of the Commission's rules.

## IV. CONCLUSION AND ORDERING CLAUSES

7. Given the seriousness of the issues discussed above, the quantity of petitions filed and the persuasive evidence of infeasibility shown in the petitions, we find the public interest would be best served by suspending enforcement of the requirement that TRS shall be capable of handling coin-sent paid calls until July 26, 1995.

8. Accordingly, IT IS ORDERED, pursuant to Sections 0.91(a), 0.204, and 1.3 of the Commission's Rules, 47 C.F.R. sections 0.91(a), 0.204, and 1.3, that enforcement of the requirement that TRS shall be capable of handling coin-sent paid calls required by Section 64.604(a)(3) of the Commission's Rules, 47 C.F.R. section 64.605(a)(3) is hereby SUSPENDED until July 26, 1995. This action does not alter any other TRS service requirements imposed by Section 64.604(a)(3) of the Commission's Rules.

9. IT IS FURTHER ORDERED that this order is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

[9] Pay text telephone calls are calls made from a coin-operated public telephone using the caller's own portable text telephone or from a coin-operated public telephone with a built-in text telephone such as those presently found in some airports and other public accommodations. *See* generally, Title III of the ADA: Public Accommodations, Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities; Final Guidelines, 36 CFR Part 1191, 56 Fed. Reg. 35408 (July 26, 1991), Amendment to Final Guidelines, 36 CFR Part 1191, 56 Fed. Reg. 45500 (September 6, 1991). These guidelines are provided by the Architectural and Transportation Barriers Compliance Board and explain accessibility requirements for public telephones, text telephones, curb cuts, counters and other public accommodations.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**
**November 18, 1993**

**Released: November 29, 1993**

Ms. Margaret Salmon
P.O. Box 1534
Cordova, AK 99574

In reply, refer to:
NAL/Acct. No. 215FE0218

Dear Ms. Salmon:

This is in response to your undated letter received March 19, 1993, in response to our Notice of Apparent Liability (NAL) dated September 29, 1992, and the subsequent Forfeiture Order (NOF) dated November 9, 1992, issued to you for operation of an unlicensed radio station aboard your vessel SISIOOH, Official Number 562391.

You indicate that your present financial situation is such that you are unable to pay such a large forfeiture. In support thereof, you submitted copies of your tax returns for 1990 and 1991 along with a copy of a March 9, 1993, statement of liabilities and assets. These documents are so incomplete that we are unable to make any determination of your financial condition or ability to pay.

The Commission has recently reviewed and revised its standards for issuance of forfeitures of this type. *See 1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993). Based on the revised standard and the fact that there is no prior record of a violation of this type on your part, we are reducing the forfeiture amount to $100.

You are ordered to pay a forfeiture of $100. This amount is due and payable immediately. Payment should be made by check or money order made payable to the Federal Communications Commission. Send the payment to:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

To assure proper credit, please place the number NAL/Acct. No. 215FE0218 on your remittance.

Any further correspondence concerning this matter should be addressed to:

Chief, Legal Branch, Field Operations Bureau
Federal Communications Commission
Stop Code 1500E3
1919 M St., N.W.
Washington, DC 20554

We note that at the time of the radio communications that resulted in issuance of this forfeiture, the transmitter was measured operating on a frequency beyond tolerance from the assigned frequency. If the station had been properly licensed at the time, the operation would have been in violation of Section 80.209(a) of the Commission's Rules. Such off-frequency operation would normally result in assessment of an additional forfeiture. Therefore, you should not operate the radio until that technical discrepancy is corrected. We note further that the Commission's ship radio licensing records fail to confirm that your vessel is now licensed. Any further operation of your boat's radio prior to its being licensed will be considered repeated unlicensed operation that will result in greater penalties than those assessed for the first violation.

A copy of FCC Form 506 is enclosed for your convenience in applying for a ship station license.

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

enclosure

CC:
Margaret Salmon
2430 Mt. Augustine Drive
Homer, AK 99603

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re

Angel R. Roque, Jr. NAL Acct. No. 215ST0022
Lynnwood, Washington

**ORDER**

**Adopted: November 18, 1993; Released: November 29, 1993**

By the Field Operations Bureau:

## I. INTRODUCTION

1. The Bureau has before it a letter filed by Angel R. Roque, Jr. (Petitioner) that is being treated as a Petition for Reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R.§ 1.106. Petitioner requests review of the Seattle Field Office's order released September 3, 1992, finding him liable for a monetary forfeiture in the amount of $2,000 for violating Section 301 of the Communications Act of 1934 as amended. 47 U.S.C. § 301 (Act).

2. We are affirming the previously issued Notice of Forfeiture (NOF) and find that its appropriate amount is $2,000.

## II. BACKGROUND

3. On February 12, 1992, investigators from the Seattle Field Office monitored Mr. Roque transmitting on the frequency 27.609 MHz. Mr. Roque is not authorized by the Commission to transmit on that frequency. The Commission issued a Notice of Apparent Liability (NAL) on July 27, 1992, for $2,000 and an NOF in that amount dated September 3, 1992.

4. Petitioner requested review of the Forfeiture Order in a letter dated September 28, 1992. He states that he was unaware that the frequencies he operated on were unauthorized and, therefore, was not willfully or deliberately violating any communications laws. He also argues that his actions were not willful due to his ignorance of the law, and that there was no warning given prior to the violation. Petitioner further argues other radio users may have been responsible for the unauthorized transmissions overheard in the area.

## III. DISCUSSION

5. As defined by the Act, willful activity includes any activity deliberately taken, such as operating an illegally modified radio, that violates the Act or Commission's Rules.[1] Knowledge that the activity violates the Rules is not necessary for the Commission to find that activity is willful. *Triad Broadcasting Co., Inc.*, 96 FCC 2d 1235, 1242 (1984). In this case, the Petitioner admitted to the activity and the activity was willful and intentionally undertaken. Regarding a prior warning, the Commission is not required to give a warning to a party wrongfully engaged in an activity that requires Commission authorization. *See* 47 U.S.C. § 503(b)(5). In response to petitioner's last argument, we note that close-in radio direction-finding techniques used by engineers from the FCC's Seattle Office located transmissions emanating from a van operated by Petitioner, who has admitted to using illegally modified CB equipment to operate on out-of-band channels. At the time of the violation, Petitioner was in possession of the illegally modified CB and amateur radios. Thus, the presence of other radio operators in the area does not change the finding of willful activity by the Petitioner.

## IV. CONCLUSION

6. For the reasons stated above, we affirm the finding of liability for monetary forfeiture in the amount of $2,000. Petitioner has failed to raise any reasons requiring a reduction of the forfeiture amount. In determining the amount of forfeiture, the Commission's policy regarding forfeiture adjustments was taken into consideration, *see Policy Statement, Standards for Assessing Forfeitures*, 93-382 (released August 12, 1993). No further adjustments appear warranted.

## V. ORDERING CLAUSES

7. Accordingly, pursuant to Section 503(b) of the Communications Act, IT IS ORDERED that Angel R. Roque, Jr. FORFEIT to the United States the sum of $2,000 for willful violation of Section 301 of the Communications Act.

8. IT IS FURTHER ORDERED that, pursuant to Section 503(b) of the Act and Section 1.80 of the Rules that Angel R. Roque, Jr. shall make such payment within 30 days of receipt of this Order. Payment should be made by check or money order payable to the Federal Communications Commission, attention NAL Acct. No. 215ST0022, and must be mailed to:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

[1] Section 312(f)(1) of the Communications Act, which also applies to Section 503(b) (*see Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991)), provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or by a treaty ratified by the United States.

9. IT IS FURTHER ORDERED that the Field Operations Bureau send by Certified Mail--Return Receipt Requested-- one copy of this Order to Angel R. Roque, Jr., 20115 44th Avenue West, Suite 201, Lynnwood, Washington 98036.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 19, 1993

## NEW PLEADING CYCLE ESTABLISHED FOR PETITIONS AND REPLIES REGARDING EXPANDED INTERCONNECTION TARIFFS FOR SWITCHED TRANSPORT - CC DOCKET NO. 91-141

**COMMENTS: December 13, 1993**
**REPLY COMMENTS: December 30, 1993**

On September 2, 1993, the Commission released Expanded Interconnection with Local Telephone Company Facilities, Transport Phase I, CC Docket No. 91-141, FCC No. 93-379. That Order required Tier 1 local exchange carriers, except NECA pool members, to file expanded interconnection tariffs for switched transport no later than November 18, 1993, on 90 days' notice, to be effective February 15, 1994. The Order clearly intended to set a 90-day notice period, but inadvertently specified dates resulting in an 89-day notice period. Because the shorter notice period would result in a shorter pleading cycle, we now establish a revised pleading cycle that reflects the original intention of the Order.

Petitions seeking suspension and/or rejection of the switched transport expanded interconnection tariffs must be filed by **December 13, 1993**, and replies to the petitions by **December 30, 1993**. An original and 4 copies of each petition or reply should be filed with the Commission and separate copies served simultaneously upon the Chief, Common Carrier Bureau, the Chief, Tariff Division, and the publishing carrier or petitioner in accordance with Section 1.773(c) of the Commission's Rules, 47 C.F.R. § 1.773(c). In addition, 1 copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

For further information, contact Amy S. Glatter, Tariff Division of the Common Carrier Bureau, at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: October 28, 1993**

**COMMISSION CLARIFIES PLEADING CYCLE FOR COMMENTS ON PETITION FOR ASSIGNMENT OF N11 CODES TO FACILITATE ACCESS TO TELECOMMUNICATIONS RELAY SERVICES (IAD File No. 93-02)**

**Comments Due: November 22, 1993 (Revised Date)**
**Reply Comments Due: December 8, 1993**

In a joint petition filed October 1, 1993 (the Petition), the National Center for Law and Deafness and Telecommunications for the Deaf, Inc., ask the Commission to direct assignment or reservation of a uniform nationwide N11 number -- 711 -- to facilitate access by individuals with hearing and speech disabilities and other text telephone users to telecommunications relay services (TRS) and would also require assignment or reservation of a second unspecified N11 number for TRS access by voice telephone users.

On October 14, 1993, the Commission released a Public Notice describing the Petition and requesting that initial comments be filed on or before November 18, 1993, and that reply comments be filed on or before December 8, 1993. *See* Commission Requests Comment on Petition for Assignment of N11 Codes to Facilitate Access to Telecommunications Relay Services, IAD File No. 93-02 (DA 93-1233).

Later, on October 22, 1993, the Commission released a Public Notice announcing that statements supporting and opposing the Petition could be filed within 30 days of that date (*i.e.*, on or before November 22, 1993). Also, the October 22 Notice assigned RM 8365 to this proceeding. *See* Associate Managing Director Public Information and Reference Services, Petitions for Rulemaking Filed, Report No. 1978 (Mimeo No. 40274).

In this Public Notice, we resolve the inconsistencies between these two earlier Notices. Initial comments on the Petition should be filed on or before November 22, 1993, and reply comments should be filed on or before December 8, 1993. All comments should be filed with the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. All comment captions should include the above Industry Analysis Division (IAD) file number and not the RM number inadvertently assigned later.

The Petition is available for inspection and duplication between the hours of 9:00 a.m. and 4:00 p.m. in the Public Reference Room of the Common Carrier Bureau's Industry Analysis Division, located at 1250 23rd Street, N.W., Plaza Level, Washington, D.C. Copies may also be obtained from International Transcription Service by calling (202) 857-3800.

For further information, contact Allen A. Barna, Industry Analysis Division, (202) 632-1370.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-93-123

Application to amend authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite circuits between the United States and Points in the Caribbean Area, Central America, South America, and Africa during the years 1993-1997

## ORDER AND AUTHORIZATION

**Adopted: November 15, 1993; Released: November 29, 1993**

By the Chief, International Facilities Division:

1. The Commission has before it for consideration one aspect of the above-captioned application filed by American Telephone and Telegraph Co. (AT&T) which was deferred by AT&T prior to a grant of the application. In particular, we now consider whether the public interest would be served by permitting the provision of AT&T's SKYNET service between the U.S. Mainland and Puerto Rico, a domestic point. No comments were received in response to particular portion of the AT&T application.

2. In its original application, AT&T sought to amend its blanket satellite authorization for service between the U.S. and points in the Caribbean area, Central America, South America and Africa.[1] AT&T also sought to add five additional locations including, Puerto Rico, to its blanket authorization. By letter dated May 24, 1993, AT&T requested that the Commission separately consider the application as its concerns the provision of its new SKYNET service between the U.S. Mainland and Puerto Rico.[2] In addition, AT&T noted that any service to Puerto Rico would be incidental to the primary international use of the circuits.

3. By letter dated August 18, 1993, AT&T noted that Communications Satellite Corporation (Comsat) was authorized to acquire units of satellite utilization from INTELSAT for the provision of Datanet service on an incidental basis via INTELSAT Atlantic Ocean Region (AOR) satellites between the U.S. Mainland and Puerto Rico.[3] In light of Comsat's authorization, which would encompass AT&T's SKYNET service, AT&T requested that the Commission act on its application.

4. In light of the above circumstances, we find that a grant of that portion of AT&T's application for provision of SKYNET service between the U.S. and Puerto Rico will serve the present and future public convenience and necessity.

5. Accordingly, IT IS ORDERED that AT&T is authorized to acquire units of satellite utilization from Comsat for the provision of its SKYNET service between the U.S. Mainland and Puerto Rico.

6. IT IS FURTHER ORDERED that this authorization is limited to the provision of SKYNET service between the U.S. Mainland and Puerto Rico which is incidental to and part of primary international communications.

7. This order is issued pursuant to Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4 (b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] *See* American Telephone and Telegraph Co., 8 FCC Rcd 4317 (1993).

[2] AT&T also withdrew its request for service between the U.S. Mainland and the U.S. Virgin Islands. *See* letter dated May 24, 1993 from Michael Donnella, AT&T to George Li, Chief, International Facilities Division, Federal Communications Commission. In light of AT&T's request that Puerto Rico be treated separately from the other points in its blanket application, we will require that any future AT&T request involving service via INTELSAT between the U.S. Mainland and an off-shore U.S. domestic point be treated separate from any blanket authorization.

[3] Letter dated August 18, 1993 from Michael Donnella, AT&T to John Coles, International Facilities Division, Federal Communications Commission.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Vitacom International Corp. File No. I-T-C-93-203

Application For Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Establish and Operate Channels of Communication between the United States and Various Locations.

**ORDER AND AUTHORIZATION**

**Adopted: November 19, 1993; Released: November 29, 1993**

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity will be served by authorization of the requested facilities and services.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-203 IS GRANTED and Vitacom International Corp. (Vitacom) is authorized to:

a. establish up to 40 64-Kbps circuits between appropriately licensed earth stations in the United States and the PAS-1 satellite for the provision of private line service not interconnected with the public switched network, between the United States and those points listed in Appendix 1 for PAS-1;

b. establish channels of communication between appropriately licensed earth stations in the United States and certain U.S. domestic satellites for the provision of transborder services, not interconnected with the public switched network, between the United States and the countries listed in Appendix 1 for U.S. domestic satellites, consistent with consultations under Article XIV(d) of the INTELSAT Agreement; and

c. establish channels of communication between appropriately licensed earth stations in the United States and the Morelos satellite system for h) the provision of transborder services, not interconnected with the public switched network, between the United States and Mexico, consistent with consultations under Article XIV(d) of the INTELSAT Agreement.

3. IT IS FURTHER ORDERED that the applicant shall file with the Commission a copy of any operating agreements it enters into with its foreign correspondents within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

5. IT IS FURTHER ORDERED that our authorization of the applicant to provide private lines is limited to the provision of such private lines only between the United States and those points listed in Appendix 1 -- that is, private lines which originate in the United States and terminate in one of the points listed in Appendix 1, or which originate in one of the points listed in Appendix 1 and terminate in the United States. In addition, the applicant may not -- and the applicant's tariff must state that the applicant's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic communications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

6. IT IS FURTHER ORDERED that neither the applicant nor any persons or companies directly or indirectly controlling or controlled by the applicant, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which the applicant or any persons or companies controlling or controlled by the applicant are parties.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

8. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for the use of any additional circuits over the PAS-1 satellite system.

9. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicant seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

## APPENDIX 1

**PAS-1**

Albania
Anguilla
Antigua
Argentina
Armenia
Aruba
Austria
Azerbaijan
Bahamas
Barbados
Barbuda
Belarus
Belize
Belgium
Bermuda
Bolivia
Brazil
British Virgin Islands
Bulgaria
Cayman Islands
Chile
Columbia
Costa Rica
Czechoslovakia
Denmark
Dominica
Dominican Republic
Ecuador
Estonia
France
Georgia
Germany
Greece
Grenada
Guatemala
Guyana
Haiti
Honduras
Hungary
Ireland
Italy
Jamaica
Kazakhstan
Kyrgyzstan
Latvia
Lithuania
Luxembourg
Mexico
Moldova
Monaco
Montserrat
Netherlands
Netherlands Antilles
Panama
Paraguay
Peru
Poland
Portugal
Romania
Russian Federation
Spain
St. Christopher and Nevis
St. Lucia
St. Vincent and Grenadines
Sweden
Switzerland
Suriname
Tajikistan
Trinidad and Tobago
Turkmenistan
Turks and Caicos Islands
Ukraine
United Kingdom
Uruguay
Uzbekistan
Venezuela
Yugoslavia

**APPENDIX 1 (cont.)**

U.S. Domestic Satellites

Anguilla
Antigua and Barbuda
Bahamas
Barbados
Belize
Bermuda
British Virgin Islands
Canada
Cayman Islands
Dominica
Grenada
Grenadines
Montserrat
Netherlands Antilles
St. Christopher-Nevis
St. Lucia
St. Vincent
Turks and Caicos Islands
Venezuela

Morelos Satellite

Mexico

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-254**

In the Matter of

Limitations on Commercial Time on
Television Broadcast Stations

**ORDER**

**Adopted: November 22, 1993; Released: November 22, 1993**

**Comment Date: December 20, 1993**
**Reply Comment Date: January 5, 1994**

By the Chief, Mass Media Bureau

1. This action extends the deadline for filing reply comments in response to the *Notice of Inquiry* in MM Docket No. 93-254, 8 FCC Rcd 7277 (1993), in which the Commission seeks comment on whether the public interest would be served by establishing limits on the amount of commercial matter broadcast by television stations. The Commission adopted the *Notice* on its own motion. The deadline for comments was originally November 29, 1993, and the deadline for reply comments was originally December 14, 1993.

2. Silver King Communications, Inc. (Silver King) requests a three-week extension of the comment and reply comment periods, in order to address adequately the issues raised in the *Notice*. Silver King states that it has commissioned several studies for submission in the record of this proceeding, but that they cannot be completed until the first two weeks of December. Thus, Silver King asserts that the extension of time will permit it to evaluate the results of the studies and incorporate them into its comments.

3. In light of the foregoing, the Bureau finds that good cause exists for an extension. Grant of the request will provide the Commission a more substantial record upon which to base its findings. Therefore, pursuant to 47 C.F.R. § 0.283, the deadline for filing comments in this proceeding is extended to December 20, 1993, and the deadline for filing reply comments is extended until January 5, 1994.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Petition for Reconsideration
of Responses to Requests for
Declaratory Rulings

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 18, 1993; Released: November 30, 1993**

By the Chief, Private Radio Bureau:

1. On August 24, 1993, Merrill T. See filed a Petition for Reconsideration[1] of the Private Radio Bureau's denial by correspondence dated August 2, 1993,[2] of his Motions for Declaratory Rulings (Motions).[3] Another Petition for Reconsideration on the same matter was filed by Mr. See on September 23, 1993.[4] The Motions address the frequency coordination process for private land mobile radio services. In both his Motions and Petitions for Reconsideration, Mr. See questions whether the Commission has exceeded its statutory authority by its 1986 actions modifying frequency coordination procedures for private land mobile services[5] and alleges various improprieties on the part of certain government officials. He also questions the authority of the Commission's General Counsel to refer the Motions to the Private Radio Bureau. Finally, pursuant to 47 C.F.R. § 1.106(a)(2), Mr. See requests that an administrative hearing be held to develop a record of the Commission's frequency coordination policy prior to 1986 and how subsequent proceedings have represented a departure from this policy.

2. Mr. See's Motions for Declaratory Rulings do not warrant reconsideration by either the General Counsel or the Private Radio Bureau. First, pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331, the Private Radio Bureau has been delegated the authority to administer frequency coordination policies and procedures, including oversight of coordinator actions and practices. Consequently, it was appropriate for the Office of the General Counsel to refer Mr. See's Motions to the Private Radio Bureau. Second, Mr. See has presented no new facts, but has merely repeated his previous allegations concerning both the Commission's statutory authority to issue those frequency coordination procedures adopted in 1986 and the conduct of various Commission personnel. *See* Sections 1.106(c) and (d) of the Commission's Rules, 47 C.F.R. § 1.106(c) and (d).[6] Mr. See's concerns have been addressed on numerous occasions by the both the General Counsel and the Private Radio Bureau and found to be without merit.[7] The public interest does not require consideration yet again of these matters. *See In re GTE Mobilnet of Houston Limited Partnership*.[8]

3. Third, Mr. See has improperly requested, pursuant to Section 1.106(a)(2) of the Commission's Rules, 47 C.F.R. § 1.106(a)(2), certification as to whether a hearing should be designated concerning frequency coordination policies. This rule provision only applies to cases in hearing. *See In re Application of Cosmopolitan Enterprises, Inc.*,[9] and *In re Applications of Gross Telecasting, Inc.*[10] As Mr. See has presented no new evidence or arguments meriting reconsideration of his Motions for Declaratory Rulings and has not met the procedural requirements of Section 1.106(a)(2), grant of his Petitions for Reconsideration would not be in the public interest.

4. Accordingly, IT IS ORDERED, pursuant to Sections 0.331 and 1.106(j) of the Commission's Rules, 47 C.F.R. § 0.331, § 1.106(j), that the Petitions for Reconsideration filed on August 24, 1993 and September 23, 1993 by Merrill T. See ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

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[1] Petition for Reconsideration of Motion for Declaratory Ruling filed by Merrill T. See on August 24, 1993.

[2] Letter from Richard J. Shiben, Chief, Land Mobile and Microwave Division, Private Radio Bureau, to Merrill T. See (August 2, 1993).

[3] Motions for a Declaratory Ruling filed by Merrill T. See on March 12, 1993 and March 15, 1993 (amended May 15, 1993).

[4] Petition for Reconsideration of Motion for Declaratory Ruling filed by Merrill T. See on September 23, 1993.

[5] Report and Order in PR Docket No. 83-737, 103 FCC 2d 1093 (1986), *recon. denied*, Memorandum Opinion and Order, PR Docket No. 83-737, 51 Fed. Reg. 36013 (1986).

[6] A petition for reconsideration must be based upon newly discovered evidence or upon errors of fact or law in the action for which reconsideration is sought. *See* WWIZ, Inc., 37 FCC 685, 686 (1964), *aff'd sub nom.* Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965), *cert. den.* 383 U.S. 967 (1966).

[7] Mr. See is largely concerned with our frequency coordination procedures as adopted by the 1986 *Report and Order*. That decision has already been upheld by the Commission in a reconsideration request. *See* note 2, *supra*. For provisions governing reconsideration of Commission action in rule making proceedings, *see* 47 C.F.R. § 1.429.

[8] 8 FCC Rcd 2728 (1993).

[9] 50 FCC 2d 308 (1974).

[10] 47 FCC 2d 349 (1974).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

Meridian Broadcasting Partnership, Debtor-in-Possession (Assignor) — File No. BALCT-930209KE

and

WMDN, Inc. (Assignee)

For Assignment of License of Television Station WTZH, Channel 24, Meridian, Mississippi

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 22, 1993; Released: November 30, 1993**

1. The Commission has before it for consideration an unopposed application to assign the license of silent television station WTZH (Channel 24), Meridian, Mississippi, from Meridian Broadcasting Partnership, Debtor-in-Possession (MBP) to WMDN, Inc. (WMDN). WMDN is wholly owned by Frank K. Spain, who also controls WTVA, Inc., licensee of television station WTVA (Channel 9, NBC), Tupelo, Mississippi. Because the predicted Grade B contours of WTZH and WTVA overlap, the proposed assignment does not comply with Section 73.3555(b) of the Commission's Rules. That rule prohibits the common ownership or control of television stations if the Grade B contours of the existing and proposed stations overlap. However, the applicants maintain that the resulting overlap is *de minimis* and request a waiver of the multiple ownership rule.[1]

2. In support of its waiver request, WMDN relies on the Commission's recognition that the financial viability of an existing station is a relevant factor in granting waivers of the duopoly provisions of Section 73.3555. *Taft Broadcasting Limited Partnership*, 7 F.C.C. Rcd 2854 (1992); *Silver King Broadcasting of Vineland, Inc.*, 2 F.C.C. Rcd 324, *recon. denied sub nom. Press Broadcasting Co.*, 3 F.C.C. Rcd 6640 (1988). In those cases, WMDN notes, the stations were either in financial distress or on the verge of bankruptcy. Here, WMDN asserts, the station is in bankruptcy and has been dark for over nine months. Thus, it argues that the benefits to be achieved outweigh any detrimental effects of the signal overlap. WMDN notes that Meridian, Mississippi, the community of license of WTZH, is located in a rural area in East-Central Mississippi and is a separate and distinct market from Tupelo, Mississippi. Tupelo, located in North Mississippi, is a commercial hub and city of license of WTVA. The cities are approximately 140 miles apart. Arbitron ranks Columbus-Tupelo as the 129th largest television market (165,100 television households), whereas Meridian is ranked as the 179th largest television market (66,000 television households).[2]

3. WMDN maintains that the overlap area is at the fringes of the stations' contours and is sparsely populated and rural. It states that the predicted Grade B contour of WTZH encompasses 10,954 square kilometers (4,229 square miles) and a population of 161,046 people and the predicted Grade B contour of WTVA encompasses 42,330 square kilometers (16,343 square miles) and a population of 690,660 people. It asserts that the overlap area encompasses 149 square kilometers (57 square miles) and a population of 1,020, which is 1.36% of the area and 0.63% of the population within the Grade B contour of WTZH and 0.35% of the area and 0.14% of the population within the Grade B contour of WTVA. Thus, WMDN states that the overlap area, and the population contained in it, is *de minimis*.

4. WMDN states that if the rule is waived, the overlap area will not lack diversity of programming. In that regard, WMDN notes that the overlap area is served, wholly or partially, by no less than five other VHF stations (one of the stations is a noncommercial educational station) and two other UHF stations (one of which is a noncommercial educational station). The television stations that serve the overlap area are WTOK-TV (Channel 11, ABC), Meridian; WMAW (Channel 14, noncommercial educational), Meridian; WGBC (Channel 30, NBC), Meridian; WIIQ (Channel

[1] The proposed assignment is part of a settlement agreement reached with the approval of the bankruptcy court. Central Television, Inc., which is wholly owned by Frank Spain, was the former licensee of WTZH and is one of the creditors before the bankruptcy court as the holder of a note for $1.9 million due from the sale of WTZH to MBP. On April 29, 1992, Central filed a competing application against the WTZH license renewal application. However, under the agreement reached by the parties, WMDN would waive its claim for the $1.9 million before the bankruptcy court and pay the court $96,000 for distribution to MBP's other creditors. In return, MBP would assign WTZH to WMDN without any further consideration. Upon consummation of the assignment, Central would dismiss its competing application. Under the circumstances presented here, the settlement is not precluded under our abuse policy since the consideration flows directly to the renewal applicant rather than the competing applicant. *Abuses of the Renewal Process*, 4 F.C.C. Rcd 4780 (1989), *recon. granted in part*, 5 F.C.C. Rcd 3902 (1990). Our restriction on settlement payments does not apply where there is a settlement agreement among the incumbent and a competing applicant that results in the sale of the station to the competing applicant or where the incumbent dismisses its application. Our purpose in limiting settlement payments is to eliminate the potential for abuse by parties who enter the comparative process for reasons other than to acquire a broadcast license. An incumbent licensee who seeks to renew its license is not in this category of potential abusers. Thus, where an incumbent wishes to sell its station to a competing applicant, or dismiss its renewal application in exchange for consideration, it does not constitute an abuse of our comparative process. 4 F.C.C. Rcd at 4784.

[2] Commercial television stations licensed to Columbus-Tupelo are WCBI-TV (Channel 4, CBS), Columbus; WLOV-TV (Channel 27, ABC), West Point (studio is located in Tupelo); and WTVA (Channel 9, NBC). Commercial television stations licensed to Meridian are WTZH (Channel 24, formerly CBS and now unaffiliated); WGBC (Channel 30, NBC); and WTOK-TV (Channel 11, ABC).

41, noncommercial educational) Demopolis, Alabama; WLBT-TV (Channel 3, NBC), Jackson, Mississippi; WCBI-TV (Channel 4, CBS), Columbus, Mississippi; and WMAB-TV (Channel 2, noncommercial educational), Ackerman, Mississippi. In fact, five of the seven television stations provide 100 percent coverage to the overlap area.

5. Finally, WMDN argues that it is well qualified to become the licensee of WTZH. It notes that its controlling shareholder, Frank Spain, had acquired the station in 1972, when the station was in bankruptcy. Since that time, he operated the station sucessfully until 1986, when he sold the station, as a full-service, full-power CBS affiliate, to MBP. Thus, WMDN contends that it has the experience and is uniquely qualified to resume operation of WTZH.

## DISCUSSION

6. The ultimate objectives of the duopoly rule, as well as the other multiple ownership rules, are to foster economic competition in broadcasting and to promote diversification of programming sources and viewpoints. *See Multiple Ownership Rules*, 22 F.C.C. 2d 306, 307 (1970), *recon. granted in part*, 28 F.C.C. 2d 662 (1971). In adopting the duopoly rule's fixed standard of a prohibited overlap of Grade B service contours, the Commission sought to provide a greater degree of certainty than under its prior rule, which prohibited the common ownership of television stations serving "substantially the same service area." *Muliple Ownership of Standard, FM and Television Broadcast Stations*, 45 F.C.C. 1476, 1476 n.1, *recon. granted in part*, 3 R.R. 2d 1554 (1964). However, the Commission maintained a policy of "flexibility," noting that the rule could be waived in cases where its application would be "inappropriate." *Id.* at 1479 n.12; *John Hay Whitney*, 28 F.C.C. 2d 736, 752 (1971).

7. Accordingly, the Commission has granted duopoly waivers where the signal overlap is *de minimis*, *see, e.g., Hubbard Broadcasting, Inc.*, 2 F.C.C. Rcd 7374 (1987), or where the public interest to be gained from waiving the rule would be greater than any detrimental effects resulting from the overlap. *See, e.g., Capital Cities Communications, Inc.*, 59 R.R. 2d 451, 465 (1985)(service to separate and distinct markets, and availability of multiple signals available in overlap area). As for the *de minimis* overlap standard, our past waiver cases have characterized this as an overlap area representing less than one percent of both the area and the population of the Grade B contour of each station. *E.g., Hubbard Broadcasting, Inc.*, 2 F.C.C. Rcd at 7374; *Capital Cities Communications, Inc.*, 59 R.R. 2d at 464 n.21; *KSOO-TV, Inc.*, 43 F.C.C. 2d 879, 880 (1973). And with regard to the second standard, in which the public interest benefits resulting from waiver of the rule are weighed against any detrimental effects of the overlap, we have considered several factors, including the extent of the overlap, the number of media voices in the overlap area, the distinctiveness of the respective markets, the independence of the stations' operations with regard to programming and advertising, and the concentration of economic power.

8. In the case before us, we note that the extent of the overlap area, as determined by the standard prediction model, falls short of our strict definition of *de minimis*, which requires that the overlap area comprise less than one percent of both the area and population within the respective Grade B contours of WTZH and WTVA. However, the geographic area is well within the range of our past waiver cases, while the corresponding populations are each less than one percent, one of the smallest percentage combinations of any non-*de minimis* duopoly case in which we have granted a waiver. *See, e.g., Sunshine Television, Inc.*, 73 R.R. 2d 29 (1993) (overlap encompasses 0.52% and 0.45% of the area and 0.62% and 1.15% of the population within the respective Grade B contours of the stations); *Thomas J. Flatley*, 7 F.C.C. Rcd 4242 (1992) (where the overlap accounted for .99% of the area and .27% of the population of one station and 2% of the area and 1.13% of the population of the other station). Thus, while not strictly complying with the *de minimis* overlap standard, this combination would fall well within the Commission's recent decisions regarding the minimum overlap permitted in a duopoly context.

9. We also find that any detrimental effect of the minimal overlap present here is outweighed by the public interest benefits to be gained from a waiver of the duopoly rule. First, grant of the application will result in reactivation of a long dark station and the provision of additional service to WTZH's community of license. Second, the overlap area already receives at least five and up to seven other television signals. The availability of these other broadcast signals in the overlap area, as well as the separate and distinct nature of the markets served by WTZH and WTVA, allay our concerns regarding undue concentration of economic control. Finally, WMDN's pledge to operate and maintain both WTZH and WTVA as separate stations further advances the Commission's diversity objective.

10. Accordingly, finding the applicants fully qualified and that approval will serve the public interest, IT IS ORDERED, That the application to assign the license of WTZH, Meridian, Mississippi, from Meridian Broadcasting Partnership, Debtor-in-Possession to WMDN, Inc., and waiver of Section 73.3555(b) of the Commission's Rules ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 91-198**

In re Applications of

| | |
|---|---|
| EDWARD F. and PAMELA J. LEVINE | File No. BPH-900514MM |
| MAURICE F. A. BATTISTI | File No. BPH-900515ME |
| MARY C. MURRAY | File No. BPH-900516MT |
| CAROL A. MORGAN | File No. BPH-900516MU |

For Construction Permit for a
New FM Station on Channel 298A,
Endwell, New York.

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 19, 1993; Released: November 30, 1993**

By the Commission:

1. We have considered applications for review of the final decision of the Review Board in this case, 8 FCC Rcd 2630 (Rev. Bd. 1993), filed by Edward F. and Pamela J. Levine on May 17, 1993, by Carol A. Morgan on May 17, 1993, and by Mary C. Murray on May 13, 1993.[1] Each appellant maintains that the Board erred in concluding under the standard comparative issue that it would best serve the public interest to grant the application of Maurice F. A. Battisti, but we do not find their contentions persuasive. Although we generally agree with the Board's rationale, some further comment is warranted concerning several of the appellants' arguments.

2. *The relative weight of the Levines' broadcast experience:* Edward F. and Pamela J. Levine -- who propose to move to Endwell if their application is granted and to participate in daily station management on a full-time basis -- conceded in pleadings before the ALJ and the Board that according to the doctrines expounded in the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), they are inferior to any qualified competing applicant that is entitled to credit for full integration enhanced by past local residence, as they themselves have never lived within the proposed service area and claim no preference for any enhancing factor except broadcast experience, which the *Policy Statement* ranks below "local residence background" in importance. *Id.* at 396. Nevertheless, they contended that their application should be ranked above the others, arguing that the *Policy Statement* 's attribution of greater significance to past local residence than to previous broadcast experience is misguided. Without responding to this argument, the ALJ and the Board held that the Levines' application is comparatively inferior due to their lack of prior local residence. 8 FCC Rcd at 2632 ¶ 5 and n.6; 7 FCC Rcd at 4088 ¶54.

3. The Levines again contend for several reasons that it would best serve the public interest for the Commission to place more weight on significant broadcast experience than on prior local residence and hence that it must do so in this case, the *Policy Statement* to the contrary notwithstanding. The crux of their argument is that people who have pursued successful careers in broadcasting and are willing to move to a prospective community of license and participate in daily management of a proposed station are likely to succeed better as owner-managers of new stations -- in satisfying audiences and advertisers, in operating profitably, and in introducing useful innovations -- than people without previous experience in broadcasting who happened to live in the proposed stations' predicted service areas prior to filing their applications. Applicants who have pursued a professional career in broadcasting, the Levines maintain, have demonstrated that they are genuinely devoted to that field of endeavor and that they have the know-how to translate "sweat equity" into success. Taking sharp issue with the *Policy Statement* insofar as it stresses the advantage of prior knowledge of community needs due to past local residence while denigrating prior broadcast expertise as being "only an initial advantage." 1 FCC 2d at 396, the Levines counter that professional broadcasters are peculiarly adept at ascertaining programming needs and that it is far easier for a professional broadcaster to learn the needs of a community to which he comes as the resident owner/manager of a local broadcast station then it is for a local resident without prior pertinent experience to become adept at broadcast station management. They assert, moreover, that it is objectively evident that the policy of giving more credit for prior local residence than for prior broadcast experience has had dismal results. Referring to a recent study reporting that more than half of the nation's

[1] Murray and Morgan filed consolidated oppositions to their adversaries' applications for review on June 1, 1993. Murray filed a motion on June 2 to strike Morgan's opposition, and Morgan filed an opposition to the strike motion on June 7. On June 15, Murray filed a motion to enlarge issues. Battisti filed an opposition to the latter motion on June 30, Murray filed a reply to his opposition on July 12, and Battisti filed a response to the reply on July 20. On July 20, Battisti also filed a motion to strike Murray's reply of July 12 or for leave to file response. Murray filed an opposition to the latter motion on July 28. On September 9, Murray filed a supplement to her motion to enlarge and a petition for leave to file the supplement. On September 20 Battisti filed a motion for extension of time in which to file an opposition to the supplement, and he filed the opposition on October 4 and a supplement thereto on October 5. On October 19 Murray filed a reply to the October 4 opposition and a petition for leave to file same.

We agree with Murray that Morgan's opposition of June 1 improperly raises arguments about Murray's comparative merit that are not responsive to any argument that Murray raised in her application for review. Hence we will grant Murray's motion to strike.

radio stations are losing money, they contend that the most plausible explanation for this is that there is currently a glut of mismanaged stations because the Commission has awarded licenses for most of the channels made available by the omnibus Docket 80-90 allocation to applicants without prior broadcast experience. Finally, the Levines contend that, aside from tending to ensure placement of new stations in competent hands, altering comparative doctrine to favor applicants with prior experience would benefit society by encouraging talented people to seek employment and advancement in broadcasting.

4. This argument does not persuade us to revise our comparative doctrine as the Levines advocate in the context of this case. Their critique of the *Policy Statement*'s rationale ignores one of the main considerations that it mentions as bearing on the relative importance of past local residence: to wit, interest in the welfare of the community to be served. *Id.* at 396. On the record before us, we continue to believe that prospective owner/managers who have been living in the locality to be served and have demonstrated a spirit of civic concern in their voluntary activities are more likely, as a general rule, to be attentive to the welfare of the community than outsiders who profess a contingent intention of moving there only in the event their applications were to be granted.

5. The Levines' policy argument is flawed in other respects as well. The assertion that successful professional broadcasters can learn to satisfy the unmet programming preferences of a community in which they are newly resident more readily than a long-time resident of the community without prior broadcasting expertise can learn to become adept at station management is not self-evidently true, and it is unsupported by any reference to corroborative evidence. The Levines' conjecture that grants pursuant to the challenged policy to persons with no prior broadcast management experience has lead to a glut of mismanaged stations is also unsupported.

6. In short, the Levines have not persuaded us to depart from this aspect of the *Policy Statement* in this case.[2] We will therefore follow precedent in this regard and reject the Levines' plea for a different comparative assessment.

7. *Request for real-party-in-interest issue against Battisti* The Levines argue in their application for review that the Review Board erred in affirming the ALJ's denial of a motion to add a real-party-in-interest issue against Battisti, but we agree with the Board that the ruling should be upheld. See the discussion on this point in the Board's decision, 8 FCC Rcd at 2635 ¶13. The Levines assert that Mr. and Mrs. Battisti "always" do business together and object that the Board did not duly consider that circumstance. The deposition transcript that the Levines cited in support of the motion to enlarge indicates that the Battistis have a single family business which they jointly manage and that Mrs. Battisti would manage the existing business by herself in the event that her husband receives a permit for the FM station. Inasmuch as they evidently plan to retain their existing business, the mere fact that they jointly operate it at present does not undermine the credibility of Mr. Battisti's representations that he would manage the proposed broadcast station without her help, as there is no showing that it would better serve their interests to manage both concerns jointly than to divide responsibility as he has proposed.

8. There is a further reason for affirming the Board's resolution of this matter, moreover. The Levines had a chance to adduce record evidence bearing on virtually the same issue as the one framed by their motion to enlarge but failed or declined to do so. They argued that the addition of a real-party-in-interest issue was warranted because a finding that the Battistis would be jointly involved in running the station and managing their existing business would necessitate a reduction in Battisti's integration credit. There was no need to enlarge the formal hearing issues to permit the adduction of evidence that would support such a finding, however, as such evidence would, indeed, have undermined Battisti's claim of fulltime integration credit and therefore would have been germane to the standard comparative issue. Because their motion to enlarge was unnecessary, the Levines cannot rightly complain that the denial of it was prejudicial.

9. *Battisti's civic activities* The Review Board found Battisti's record of civic activity more impressive than either Murray's or Morgan's, chiefly because he had held more leadership roles in local eleemosynary organizations than they. 8 FCC Rcd at 2634-35 ¶11. Having previously concluded that Battisti deserves more credit than Morgan for past local residence, the Board therefore held that Battisti outranks Morgan in overall comparative standing. It also held that Battisti is superior to Murray overall, as it concluded that his greater credit for civic activity outweighs her marginal advantage for longer local residence. *Id.* Murray and Morgan both argue that the Board should have denied Battisti any credit for civic activity because he did not disclose in his written testimony how much time he had devoted to particular activities or say whether any of them occurred within the proposed service area and because no evidence on these points was developed through cross examination.

10. We find no merit in this argument, which focusses on trivial gaps in the record. *Cf. Charisma Broadcasting Corp.*, 8 FCC Rcd 864, 865 ¶ 8 (1993) (applicants faulted for "gamesmanship" in seeking to capitalize on an allegedly incomplete record). Most of the activities that the Board gave Battisti credit for consisted of participation in organizations that are identified by name with two communities that are admittedly within the service area. 8 FCC Rcd at 2633 ¶ 8 and n.12. Battisti's submission, for the express purpose of demonstrating entitlement to credit for local civic participation, of a sworn statement that he had belonged to those named organizations and had held certain positions of responsibility in them is a *prima facie* showing of involvement in civic activity within the service area. His showing of participation in the affairs of civic organizations identified with those communities, as against which his adversaries offered no evidence by way of rebuttal, is sufficient in itself to sustain the conclusion that he deserves substantially more credit for civic activity than any of his adversaries. Moreover, we think that the Board was also right to give credit for Battisti's declared involvement in certain organizations identified by name with Broome County. Murray and Morgan both explicitly repre-

[2] This holding is without prejudice to whatever public interest determinations may be reached in the pending rulemaking concerning possible reformation of comparative doctrine based on the record compiled in that proceeding. See *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664 (1992).

sented in their direct testimony that the activities of several organizations whose names indicate that their scope of concern extends throughout Broome County took place within the proposed service area. If, as thus alleged without dispute, the activities of the Young Republicans Club of Broome County, the Broome County Women's Republican Club, the Broome County Republican Party, the Broome County Historical Society, the United Way of Broome County, the Broome County Board of Realtors, and the Broome County Chapter of the American Red Cross are substantially focussed on the proposed service area, then it is reasonable to find that Battisti's affiliation with the Broome County College Alumni Association is also geographically relevant. We do not agree that Battisti should be denied credit for civic involvement because the record does not indicate specifically how many hours he devoted to relevant activities. It appears from the nature of the positions of authority that he assertedly held in most of the organizations that he listed that his involvement in them occupied him for considerable amounts of time.

11. Nor is there any merit in Morgan's related argument that Battisti has tried to mislead the Commission by claiming credit for activities that had no peculiar relation to the service area. Morgan fails to show that there is any basis in the record for finding that any of the activities that Battisti listed are wholly extraneous to the area. The Board's determination that it is not evident whether some of the activities he listed were materially related to the service area, *id.* at 2634 n.14, is clearly not a sufficient basis for a finding that he acted in bad faith.

12. *Motion to enlarge issues:* Murray moves to add financial and false certification issues against Battisti and to reopen the record for admission of evidence relevant to those issues. In support of the motion Murray submits copies of official records indicating that tax liens were imposed at various times on a number of real properties that Battisti owns, that some of the liens remain outstanding, and that creditors registered security interests in three of his real properties in 1987 and 1992. Murray argues that the documents reveal a "startling pattern of financial instability," in light of which it is improbable that the bank from which Battisti secured a tentative loan commitment to finance his proposal would now be willing to grant him the loan, and that they raise a substantial suspicion that he knew when he certified as to his financial qualifications that he would be unable to meet the bank's collateral requirements. Battisti counters with a copy of a letter dated June 17, 1993 from the bank's assistant vice president stating that the bank was aware of the tax liabilities noted in Murray's motion, that the bank had received a detailed updated financial statement from Battisti in March 1993, and that the bank was still "comfortable with your overall financial picture" and still intends to honor its loan commitment. In reply, Murray has filed an affidavit alleging that the president of the bank told her on July 6, 1993 that the bank had made no binding commitment to extend the loan to Battisti but had instead merely invited him to submit a loan application, which the bank would evaluate according to normal credit standards.

13. In a supplementary pleading, Murray alleges that recently-published legal notices indicate that more than thirty properties owned by Battisti or his wife, aside from those mentioned in Murray's motion to reopen, are set to be sold at auction due to tax delinquencies. Battisti alleges in opposition that although there are outstanding tax charges against his properties he pays his taxes regularly. He has submitted a list indicating that he and his wife own real properties worth $2,840,000 in all, moreover, and a financial statement indicating that their current net worth (after taking property tax liability and other charges into account) is well over a million dollars. In reply, Murray maintains that she has obtained deeds proving that the Battistis have no interest in one of the listed properties and only partial interests in four of the others. She purports to show by reference to tax assessments and to the advertised asking prices of comparable properties, moreover, that Battisti has grossly exaggerated the value of his real estate holdings. Hence, she accuses Battisti of lying about these matters.

14. Murray's motion to reopen is dilatory. Even assuming, *arguendo*, that it was infeasible for her to discover the documents on which she predicates the motion until she saw a public notice concerning one of Battisti's tax problems, as she contends, we cannot find that she acted with due diligence because the documents largely pertain to events that occurred more than two years ago and because she does not say when she learned of the public notice. Hence, the first prerequisite for granting a motion to enlarge and reopen is lacking here. See *Eve Ackerman*, 8 FCC Rcd 4205 ¶ 6 (1993).

15. The petition is also substantively deficient. Murray has not shown that Battisti lacks unencumbered assets of sufficient value to satisfy collateral requirements for the proposed loan or has ever concealed information from the bank that might affect its estimate of his creditworthiness. On the contrary, Battisti has provided sufficient evidence that the bank is aware of his financial situation, is satisfied that he can meet collateral requirements for the loan, and remains willing to extend the loan on the terms specified in its original letter of commitment. See *Ackerman*, supra, 8 FCC Rcd at 4207 ¶15, and *Liberty Productions*, 7 FCC Rcd 7581, 7583 ¶16 (1992). The fact that the author of the June 17 letter is "only" vice president of the bank and did not sign the original commitment letter to Battisti, which Murray stresses, is of no moment. Further, Murray's hearsay account of conversations with the bank's president do not suffice, in the face of Battisti's counter-showing, to persuade us that there is a substantial likelihood that Battisti would ultimately be found disqualified if we were to grant the motion to enlarge and reopen. See *Ackerman* at ¶ 6. Likewise, the arguments in Murray's October 19 reply about the validity of Battisti's representations as to the value of his real-estate holdings do not materially undermine the reliability of the bank commitment, as it has not been shown what if any assumption the bank made about property values when it extended the commitment.

16. Nor has it been shown that there is any need to specify an issue as to the candor of Battisti's representations concerning his real estate holdings. Contrary to Murray's assertion, none of the deeds that she has submitted indicates that the Battistis have no interest in the listed property at 209 N. Nanticoke, as none of them refers on its face to a property of that description, and the fact that one of them indicates that Battisti's sister has a twenty-percent interest in a property at 43 Washington Avenue is irrelevant, as Battisti has not represented that he owns property at that address. The showing that his sister has a twenty-percent interest in two listed properties with a combined value of $311,250, by Battisti's estimate, and that the Battistis share ownership of another listed property that he estimates to be worth $64,000 with another married couple does not raise a substantial and material question of fact, as

the third-party interests have no significant bearing on Battisti's indicated net worth.[3] Moreover, neither Murray's allegation that Battisti's estimates of property values exceed their assessed value for purposes of taxation nor her showing as to the asking prices of "comparable" properties raises a question that merits further consideration. Aside from the fact that it is unsubstantiated, the information about tax assessments is not prima facie evidence of market value, absent information as to the method by which the assessments were calculated. The showing as to the advertised asking prices of properties that the Battistis do not own is also nonprobative, as it is not apparent from information before us what relationship there is between the value of those properties and the value of the properties in Battisti's list.

17. ACCORDINGLY, IT IS ORDERED that the motion to strike filed on June 2, 1993 by Mary C. Murray IS GRANTED in part and the text of Carol A. Morgan's "Partial Opposition to Applications for Review," filed on June 1, 1993, from the beginning of the last paragraph on the first page to the end of the first paragraph on page 9 IS STRICKEN; that the motion to strike or for leave to file response filed by Maurice F. A. Battisti on July 20, 1993 IS GRANTED insofar as it requests leave to file a response and the response to reply filed by Battisti on July 20, 1992 IS ACCEPTED; that Murray's petition for leave to supplement filed on September 9, 1993, Battisti's motion for extension of time filed on Septmeber 20, 1993, and Murray's October 19, 1993 petition for leave to file a reply ARE GRANTED; that the motion to enlarge issues filed by Mary C. Murray on June 15, 1993 IS DENIED; that the applications for review filed on May 13 and 17, 1993 by Mary C. Murray, Carol A. Morgan, and Edward F. and Pamela J. Levine ARE DENIED; and that the Review Board's grant of the application of Maurice F. A. Battisti (File No. BPH-900515ME) and denial of the competing applications IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[3] In any event, it is not clear that the value of the third-party interests is included in the asset valuation in the financial statement that Battisti submitted along with the list of real estate properties. The sum of the indicated market values of the listed properties is $2,840,000, but only $2,784,575 is entered in the line in the financial statement designated "Real estate."

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

Edens Broadcasting, Inc.

For Renewal of Licenses for Stations KKLQ/KKLQ-FM[1] San Diego, California

File Nos. BR - 900801VV
BRH - 900801WO

**MEMORANDUM OPINION AND ORDER AND NOTICES OF APPARENT LIABILITY**

**Adopted: November 19, 1993; Released: November 22, 1993**

By the Commission:

## I. INTRODUCTION

1. The Commission has before it for consideration (i) license renewal applications filed for the above-captioned radio stations in San Diego, California; (ii) a Petition to Deny timely filed on November 1, 1990, by the California State Conference of Branches of the NAACP, various local NAACP branches (collectively "NAACP") and the National Black Media Coalition (hereinafter "NBMC") against the renewal applications of the captioned broadcast stations;[2] (iii) an opposition from the licensee; (iv) the licensee's reponse to a staff letter of inquiry; and (v) other pleadings.

## II. BACKGROUND

2. The NAACP/NBMC allege that the challenged stations violated our Equal Employment Opportunity (EEO) Rule and policies. Accordingly, both organizations request that we conduct an investigation of the stations' employment practices pursuant to *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*), designate the renewal applications for hearing and, thereafter, deny the applications. The licensee charges that the NAACP/NBMC have presented no evidence of discrimination, that the records indicate compliance with the Commission's EEO Rule, and that unconditional renewal is warranted.

## III. DISCUSSION

3. *SETTLEMENT AGREEMENT.* On April 4, 1991, the NAACP filed a motion to withdraw its challenge against the renewals for stations KKLQ/KKLQ-FM and, together with the licensee, Edens Broadcasting, Inc., filed a settlement agreement. By letter of November 5, 1991, the Commission approved the settlement agreement and accepted the NAACP's motion to withdraw its petition.[3] However, notwithstanding the agreement, we have reviewed the stations' Equal Employment Opportunity (EEO) Program and performance pursuant to Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. Section 309. We find the licensee did not engage in affirmative recruitment efforts for a substantial number of its vacancies and failed to maintain adequate records for much of its tenure. Thus, we will grant renewal subject to appropriate remedies and sanctions.

4. *STANDING.* KKLQ/KKLQ-FM argue that the unsigned statement of the NBMC chairman fails to establish standing either for himself or the NBMC because he does not claim listenership of the stations or residency in the stations' service area. The stations argue that none of the NBMC's remaining declarations submitted with its petition purport to address the stations' renewal applications and that, therefore, the pleading should be treated as an informal objection.

5. In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit, "specific allegations of fact sufficient to show ... that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience and necessity]." 47 U.S.C. Section 309(d)(1); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

6. Filed with the petition to deny was an unsigned declaration under penalty of perjury from the chairman of the National Black Media Coalition. He does not claim to be a listener of the challenged stations or a resident of the stations' service area. Thus, his declaration does not satisfy the standing requirements of the Act. Therefore, we hold that the NBMC lacks standing to petition the renewal applications and we will treat its pleading as an informal objection in accordance with 47 C.F.R. 73.3587. *See Michigan/Ohio Broadcast Renewals*, 3 FCC Rcd 6944 (1988); *see also KDEN Broadcasting Company*, 55 Rad. Reg. 2d (P&F) 1311, 1311-12 (1984).

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[1] We note that on November 25, 1986, the Commission granted the assignment of license application for KKLQ(AM) (File No. BAL - 861020FU) from SBI-KOGO, Inc. to Edens Broadcasting, Inc. Also on that date, the Commission granted the assignment of license and construction permit applications for KKLQ(FM) (BAPLH - 861020FV) from SBI of San Diego, Inc. to Edens Broadcasting, Inc. Currently pending before the Commission are the assignment of license application for KKLQ(AM) (BAL - 930419EA) from Edens to PAR Broadcasting Co., Inc. and the assignment of license and construction permit applications for KKLQ-FM (BAPLH - 930419EB) from Edens to PAR Broadcasting Co., Inc.

[2] We note that the California affiliates of NBMC, although parties to the Petition, do not join in the Petition insofar as it relates to KKLQ/KKLQ-FM. The Petition also includes challenges against other radio stations in California which will be addressed in a separate Commission order.

[3] Due to the settlement agreement reached by the parties, the issue of standing for NAACP is moot.

7. *PRIMA FACIE CASE.* The NBMC derived its factual allegations from the licensee's EEO programs and annual employment reports. Review of the licensee's EEO records led us initially to conclude that the NBMC presented a *prima facie* case against the stations, demonstrating that unconditional grant of the renewal applications would have been inconsistent with the public interest. Section 309(d)(1) of the Communications Act of 1934, 47 U.S.C. Section 309(d)(1). *Astroline, supra.*[4] Further inquiry was therefore necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont); Bilingual, supra.*

8. Review of the NBMC's EEO allegations, as well as the licensee's oppositions and inquiry responses, leads us to conclude that there are no substantial and material questions of fact warranting designation for hearing. We find no evidence of employment discrimination. Thus, grant of the applications will serve the public interest. 47 U.S.C. Section 309(d)(2); *Astroline, supra.* However, we will grant renewal with appropriate remedies and sanctions.

9. Section 73.2080 of the Commission's Rules, 47 C.F.R. 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080(b) and 73.2080(c).

10. When the renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987)(*Broadcast EEO), petition for recon. pending; see also* 4 FCC Rcd 1715 (1989)(request for clarification by the National Association of Broadcasters). *See e.g., Beaumont, supra; Bilingual, supra.*

11. Review of KKLQ/KKLQ-FM's renewal applications, oppositions and inquiry responses indicates that the stations filled 43 full-time, including 31 upper-level, positions during the three-year review period July 1, 1987, to June 30, 1990. The licensee states that it attracted 14 minority referrals from these sources as follows: employee referrals (five), "radio grapevine" (three), Robert Half & Associates (one), its Phoenix, Arizona "sister station" (one), *SD Union* (one), walk-in applicants (one), TM Communications (one), and a local station (one). In their amended renewal applications (filed May 27, 1993), KKLQ/KKLQ-FM report 62 minority referrals from 20 recruitment sources based on "reconstructed" data.[5] The stations indicate that they were able to determine the number of minority referrals for only the reporting year, but did not know the number of referrals from each recruitment source.

12. KKLQ/KKLQ-FM indicate that they announced job vacancies over the air, and contacted these sources (although no minorities were attracted): *Radio & Records, Billboard Magazine, Radiostar Magazine, Hits/Hitmaker Magazine, Broadcast ing Magazine, San Diego Union/Tribune Newspaper, San Diego Voice and Viewpoint, La Prensa, San Diego Credit Association, Ahora Now,* resumes on file, WPLJ Radio, Talent Masters and SW College.[6] KKLQ/KKLQ-FM did not contact all sources for each job vacancy, but used their sources in various combinations. Based on our review, it appears that the stations conducted no recruitment for 28 (65%) jobs.[7] KKLQ/KKLQ-FM concede that their "record-keeping with respect to minority applications ... has been less than perfect." The stations provide estimates on applicant flow for 14 of the 15 recruited positions. Of 519 applicants attracted for those positions, 64 were minorities. The record does not include interviewee data. The stations hired six minorities (four Hispanics, one Black and one American Indian) for four upper-level (three Hispanics and one American Indian) and two lower-level job vacancies.[8]

13. The NBMC argues that because the licensee did not include the same recruitment sources on its 1990 renewal application as it did on its 1986 assignment application, it is questionable whether KKLQ/KKLQ-FM made any of

[4] The licensee was not challenged regarding its efforts directed toward women. Nonetheless, as is our practice in all cases, we reviewed the stations' EEO efforts toward women. We found them sufficient.

[5] It is noted that the 62 minority referrals were for 31 positions (13 full-time and 18 part-time) filled during the 12 months prior to renewal, *i.e.*, July 1, 1989, to June 30, 1990. It is not clear how many of the 13 full-time positions resulted in minority referrals, vis-a-vis the part-time positions.

[6] The stations included eight schools among their recruitment sources, however, it appears that these educational institutions were primarily used to recruit for part-time positions.

[7] Of the 15 recruited positions, the stations used 17 of their sources from one to ten times each. The licensee indicated the referral source of the hirees for 14 of 43 jobs. Most of the applicants hired (five, including two minorities) were referred by employees and three were referred by "radio grapevine" or "word of mouth." Six other hired applicants were referred by six additional sources including, among others, a local radio station, its Phoenix, Arizona "sister station," and a walk-in applicant/hire.

[8] KKLQ/KKLQ-FM are located in the San Diego, California Metropolitan Statistical Area which includes 43.6% females and 22.6% minorities (4.5% Black, 13.4% Hispanic, 4.1% Asian/Pacific Islander and .6% American Indian). In 1990, the stations reported a full-time staff of 48 employees including two Hispanics (4%), two Blacks (4%) and two American Indians (4%). The upper-level staff of 38 employees included two Hispanics (5%) and two American Indians (5%). In 1989, among 49 employees, the licensee reported one Black (2%), two Hispanics (4%) and one American Indian (2%). The upper-level staff of 40 employees included two Hispanics (5%). The 1988 Annual Employment Report included three minorities (8%), one Black and two Hispanics, among 37 overall employees. One Black (3.3%) and one Hispanic (3.3%) were reported on the staff of 30 upper-level employees. In 1987, the overall staff of 28 employees included one Asian Pacific-Islander (3.5%) and one American Indian (3.5%). The upper-level staff decreased to 21 employees and included one Asian Pacific-Islander (5%).

their proposed EEO efforts.[9] It criticizes the licensee's failure to list specifically the number of minorities and women referred from each referral source. The NBMC further argues that it is doubtful that 60 minorities were referred from nonminority job sources as indicated by the stations in their original renewal applications. Lastly, according to the NBMC, if the licensee attracted 60 minority referrals, the fact that only three minorities were hired for 13 renewal year jobs tends to suggest discrimination.

14. KKLQ/KKLQ-FM respond first to the NBMC's charges of alleged discrepancies in their proposed EEO programs, stating that their 1986 assignment application included prospective referral sources that they were not obligated to use. Secondly, KKLQ/KKLQ-FM admit that their record-keeping has been "somewhat inadequate" because they incorrectly believed that it was illegal to collect race data. However, the licensee states that it has adopted new procedures to track this information. Third, the stations challenge the NBMC's contention that such a large number of minorities could not have been referred from its general recruitment sources. The licensee maintains that the NBMC does not present evidence that its organization would have had "qualified job candidates available had Edens inquired." Finally, KKLQ/KKLQ-FM rebut as simply speculative the NBMC's assertion that discrimination may have occurred based on the difference between the number of minority referrals and the number of minorities hired.

15. We find no record evidence which presents a substantial or material question of fact warranting a hearing. We find no indication of employment discrimination because the licensee attracted, interviewed and hired minorities during its tenure. However, the licensee's recruitment efforts were inadequate given the circumstances of its high turnover and the minority presence in the Metropolitan Statistical Area (MSA). It reported 43 full-time jobs, but established recruitment for only 15 of those jobs. The stations' minimal recruitment efforts contributed to their inability to attract and employ Hispanics adequately, the San Diego MSA's dominant minority group (13.4%). Further, the licensee's record-keeping was deficient and as a result, it did not thoroughly track its minority referrals or applicants. In this context, we note that KKLQ/KKLQ-FM does not appear to have self-assessed the core components of their EEO program.

16. Further, the efforts KKLQ/KKLQ-FM directed toward Hispanics and other minority groups were deficient. Thus, minorities were inadequately recruited and employed. The record does not establish a continuing effort to attract qualified Hispanic and other minority applicants by contact with effective general or minority-specific sources. Nor does the record establish any timely initiatives to reverse shortcomings in the EEO program or its administration. Accordingly, we will grant renewal for a short term subject to reporting conditions, and issue a Notice of Apparent Liability for $18,750.[10]

## IV. CONCLUSION

17. Upon review of the record, we find that grant of the renewal applications is in the public interest. However, renewal is granted for less than a full term, ending December 1, 1995, and to ensure that better efforts are taken with respect to the licensee's EEO program, we will impose reporting conditions. Further, by this *Order*, we will issue a Notice of Apparent Liability for $18,750 against the licensee of KKLQ/KKLQ-FM for violation of our EEO Rule.

## V. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that the Joint Request for Approval of the Settlement Agreement IS GRANTED and the settlement agreement submitted by NAACP and Edens Broadcasting, Inc. is approved.

19. IT IS FURTHER ORDERED that the informal objection filed by the National Black Media Coalition IS DENIED.

20. IT IS FURTHER ORDERED that the license renewal applications for Stations KKLQ/KKLQ-FM ARE GRANTED FOR A SHORT TERM ending December 1, 1995, subject to the reporting conditions specified herein, and pursuant to Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $18,750.

21. IT IS FURTHER ORDERED that the licensee of Stations KKLQ/KKLQ-FM submit to the Commission an original and one copy of the following information on August 1, 1994, August 1, 1995, and August 1, 1996:

(a) For each report, please make two lists divided by full-time and part-time job vacancies during the twelve months preceding the respective reporting dates, indicating the job title and FCC job category, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[11]

(b) A list of all employees as of the July 1, 1994, payroll period for the first report and as of the July 1, 1995, and July 1, 1996, payroll periods for the second and third reports by job title and FCC job category, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex and race or national origin; and

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[9] Although NAACP and NBMC filed a joint challenge against the stations' renewal applications, NBMC is not a party to the settlement agreement between the licensee, Edens Broadcasting, Inc. and NAACP. *See* paragraph 3, *supra*.

[10] In view of the pending assignment applications for KKLQ/KKLQ-FM, we note that upon grant of those applications, the reporting conditions will follow the licenses and pass automatically to the assignee. *See Woolfson Broadcasting, Inc.*, 4 FCC Rcd 6160 (1989).

[11] Such a list might start:

1) News Director: Officials and Managers; Full-time.

| | | |
|---|---|---|
| 3 Applicants: | 1 White female | A.W.R.T |
| | 1 Hispanic male | National Hispanic Media Coalition |
| | 1 Black female | NAACP |

Sources contacted - Local newspaper, A.W.R.T., National Hispanic Media Coalition and NAACP

Selected - Hispanic male (08/19/93)

(c) Details concerning the station's efforts to recruit minorities for each position filled during the 12-month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any information it believes relevant regarding the station's EEO performance and its efforts thereunder.

22. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to all parties.

23. The reports are to be filed with the Acting Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

24. Should you have any questions regarding this action or require further information concerning employment reports, you may call the Mass Media Bureau's EEO Branch at (202) 632-7069. With respect to the forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80, as summarized in the attachment to this Order. Any comments concerning the ability to pay should include those financial items set forth in the attachment.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

BellSouth Corporation's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs — AAD 92-89

**ORDER**

**Adopted: November 23, 1993; Released: November 29, 1993**

By the Chief, Accounting and Audits Division:

1. On September 30, 1992, BellSouth Corporation (BellSouth) filed revisions to its Cost Allocation Manual (CAM). Included in the filing were revisions to Section VII, Time Reporting Procedures, to implement a statistical sampling process known as the Work Activity Statistical Sampling Process (WASSP). BellSouth proposes to use WASSP in place of time reporting for assigning certain field technician expenses to Part 32 accounts and Part 64 cost pools.

2. Revisions to time reporting procedures normally take effect 60 days following submission of the revisions. However, BellSouth's revisions raised serious concerns, not only as to how costs are to be assigned initially to the appropriate Part 32 accounts, but also as to how costs are to be allocated among regulated and nonregulated activities. Therefore, on November 2, 1992, we issued an Order staying BellSouth's implementation of WASSP until May 28, 1993, to allow sufficient time to review whether the revisions comply with the Commission's accounting and cost allocation rules.[1]

3. As part of this review process, we required BellSouth to provide assurance that the results of using statistical sampling are as accurate as the results achievable by using positive time reporting. Additionally, we required BellSouth to have an independent audit of WASSP.[2] We further stayed the effective date of BellSouth's proposed revisions until November 29, 1993, to allow for completion of the required audit and our review of the audit report and workpapers.[3]

4. The independent audit has been completed, and is being reviewed by the FCC staff. Since the completion of the independent audit, BellSouth has made changes to its WASSP system. On November 5, 1993, BellSouth filed a letter requesting that we further stay its implementation of WASSP until December 30, 1993, to give us time to evaluate the implementation of these changes. We grant this request.

5. Accordingly, IT IS ORDERED that the revisions to BellSouth's Cost Allocation Manual pertaining to Section VII, Time Reporting Procedures, filed September 30, 1992, ARE STAYED until December 30, 1993.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division

[1] BellSouth Corporation's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 7 FCC Rcd 7220 (Accounting and Audits Div. 1992).

[2] *See, e.g.*, Letter from Kenneth M. Ackerman, Chief, Accounting Systems Branch to Maurice P. Talbot, Jr., Director, Federal Regulatory (Oct. 9, 1992).

[3] BellSouth Corporation's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 8 FCC Rcd 3569 (Accounting and Audits Div. 1993).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AMERICAN NETWORK EXCHANGE, INC.,
CABLE & WIRELESS, INC., and
LDDS COMMUNICATIONS, INC. d/b/a
LDDSMETROMEDIA COMMUNICATIONS,
Complainants,

v.

NEVADA BELL, File No. E-93-118
Defendant.

**ORDER**

**Adopted: November 19, 1993; Released: November 30, 1993**

By the Chief, Formal Complaints & Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 27, 1993, American Network Exchange, Inc., Cable & Wireless, Inc. and LDDS Communications, Inc. d/b/a LDDSMetromedia Communications (LDDS) jointly filed the above-captioned complaint against Nevada Bell seeking damages resulting from Nevada Bell's alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990. On November 15, 1993, LDDS filed a motion for partial dismissal of the complaint stating that it had ascertained, subsequent to the filing of the complaint, that it did not purchase interstate access service from Nevada Bell during the monitoring period.

2. We will grant LDDS' motion and dismiss it from this proceeding. It is clear that LDDS did not purchase interstate access services from the defendant during the period in question and has no basis for the damages claim set forth in its complaint. In the future, LDDS should be mindful that under Section 1.722(a) of the Commission's rules,[1] complaints seeking the recovery of damages must contain allegations showing a basis for a damages award. A more diligent review by LDDS of the facts underlying its complaint might have avoided the unnecessary expenditure of time and resources by the staff and the defendant in this proceeding.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that LDDS Communications, Inc. d/b/a LDDSMetromedia Communications' Motion for Partial Dismissal of the complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

[1] 47 C.F.R. § 1.722(a).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-233**

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Pine Bluff, Arkansas
in the Little Rock, Arkansas,
Television Market

**REPORT & ORDER**
**(Proceeding Terminated)**

**Adopted: November 23, 1993; Released: November 30, 1993**

By the Chief, Mass Media Bureau:

1. Before the Commission is the *Notice of Proposed Rule Making* in MM Docket No. 93-233, 8 FCC Rcd 5595 (1993) (*"Notice"*), issued in response to a petition filed by Agape Church, Inc., licensee of television station KVTN(TV), Channel 25 (Independent), Pine Bluff, Arkansas, to amend Section 76.51 of the Commission's Rules , 47 C.F.R. Section 76.51, to add Pine Bluff as a designated community in the Little Rock, Arkansas, television market. No comments were filed in response to the *Notice*.

2. In the *Notice*, we tentatively concluded that a sufficient case for redesignation of the subject market had been set forth such that the proposal should be tested through the rulemaking process. We noted that the information before us in the petitioner's request indicated that KVTN and stations licensed to communities in the Pine Bluff and Little Rock television markets do compete for audiences and economic support throughout much of the combined market area, and that sufficient evidence had been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole. Moreover, we observed that the petitioner's proposal appeared to be consistent with the Commission's policies regarding redesignation of a hyphenated market.

3. For the reasons outlined in the *Notice*, we believe that amendment of Section 76.51 as requested by the petitioner is consistent with the procedures outlined in Section 4 of the Cable Television Consumer Protection and Competition Act of 1992,[1] which amended Section 614(f) of the Communications Act of 1934, and will serve the public interest by meeting the underlying purposes of the market hyphenation rule to equalize competition among stations in genuine competition. *See, e.g., Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122 (1985).

4. Accordingly, pursuant to delegated authority,[2] IT IS ORDERED that, effective thirty (30) days after publication in the Federal Register, Section 76.51(b) of the Commission's Rules, Major Television Markets, IS AMENDED to include Pine Bluff, Arkansas, as follows:

Little Rock-Pine Bluff, Arkansas.

5. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] Pub. L. No. 102-385, 106 Stat.1460 (1992).
[2] *See Report and Order* in MM Docket No. 92-259, 8 FCC Rcd 2965, 2978, n.150 (1993).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-298**

In re Application of

David Lee Communications, Inc.

For Renewal of License of Station WTRX(AM), Flint, Michigan — BR-890602UJ

## HEARING DESIGNATION ORDER

**Adopted: November 12, 1993; Released: November 30, 1993**

By the Chief, Audio Services Division:

1. The Chief, Audio Services Division, Mass Media Bureau, has before him: (a) the captioned application for renewal of license filed by David Lee Communications, Inc., (Lee) licensee of WTRX(AM), Flint, Michigan; and, (b) the results of an investigation into WTRX(AM)'s silent status.[1]

2. The Commission's records indicate that WTRX(AM) has been silent since August 20, 1990. The station's authority to remain silent expired on April 29, 1993. The current renewal of license application for WTRX(AM) has not been acted upon because of the station's silent status.[2]

3. The licensee's last request for authority to remain silent was granted by letter dated January 29, 1993, from the Chief, AM Branch, Audio Services Division, Mass Media Bureau. In that letter, Lee was advised that any future requests for authority to remain silent must be accompanied by a detailed summary of steps being taken to return WTRX(AM) to on-air operations. By letter dated April 13, 1993, Lee requested a further extension of its authority to remain silent. In that letter, Lee noted that it was currently negotiating with several investors in an effort to return the station to the air.

4. By letter of April 30, 1993, the Chief, AM Branch advised Lee that its showing with respect to the steps taken to return WTRX(AM) to the air was not sufficient. Lee was requested to provide a detailed explanation of the specific steps it has taken to return the station to the air, including, but not limited to, "a marketing plan, proof of listing with a broker, a list of prospective investors or buyers contacted and all other positive efforts made to sell the station." By letter of June 3, 1993, Lee responded that it has discussed the sale of WTRX(AM) with no less than fifteen different parties over the last twelve months, with no offers, and that it is currently in the process of negotiating a merger with a local station which would result in putting the station back on the air "in a relatively short period of time." Lee also included a copy of a commitment letter from the Republic Bank of Flint, Michigan for a $300,000 loan to the radio station.

5. The bank letter gives approval of a commercial loan to refinance the building located at 3076 E. Bristol Road. It states that the loan proceeds will be used to pay off an existing mortgage and it does not indicate that Lee would receive any funds from the refinancing. Furthermore, no application proposing the assignment of the WTRX(AM) license has been filed with the Commission. WTRX(AM) has not demonstrated that causes beyond its control prevent it from resuming broadcasting. This fact, coupled with the fact that WTRX(AM) has been off the air for over three years, supports our determination that Lee is in apparent violation of Sections 73.1740(a)(4) (Minimum Operating Schedule) and 73.1750 (Discontinuance of Operation) of the Commission's Rules.[3] We believe that the evidence before us is sufficient to raise a substantial and material question of fact regarding Lee's capability and intent to resume the broadcast operations of WTRX(AM). We will therefore designate the WTRX(AM) renewal of license application for an evidentiary hearing on appropriate issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 309(e), the renewal of license applications of Station WTRX(AM), Flint, Michigan, IS DESIGNATED FOR HEARING at a time and place to be specified in a subsequent Order, upon the following issues:

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[1] The Mass Media Bureau has been delegated authority to designate for hearing the renewal of license applications of silent broadcast stations. *See Moenkopi Communications, Inc.*, 8 FCC Rcd 3990 (1993).

[2] It is the Commission's general policy to defer action on a station's renewal of license application while that station is silent.

[3] Section 73.1740(a)(4) provides:

> "In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary."

Section 73.1750 provides:

> "The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation."

(a) To determine whether David Lee Communications, Inc. has the capability and intent to expeditiously resume broadcast operations of WTRX(AM) consistent with the Commission's Rules.

(b) To determine whether David Lee Communications, Inc. has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.

(c) To determine, in light of the evidence adduced pursuant to the preceding issues, whether grant of the subject renewal of license application would serve the public interest, convenience and necessity.

7. IT IS FURTHER ORDERED, That, in the event it is determined that grant of the renewal of license application would serve the public interest, convenience and necessity, the grant will be conditioned on the expeditious resumption of operation, the precise period of time to be established in the hearing. Failure to resume operations within the time specified in the condition will result in the cancellation of the license and the deletion of the station's call letters.

8. IT IS FURTHER ORDERED, That, in accordance with Section 309(e) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the LICENSEE, David Lee Communications, Inc.

9. IT IS FURTHER ORDERED, That, to avail itself of the opportunity to be heard, the licensee, pursuant to Section 1.221(c) of the Commission's Rules, SHALL FILE with the Commission, in person or by attorney, within twenty (20) days of the mailing of this Order, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the licensee herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rules, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

11. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order denying the renewal of license application of WTRX(AM), Flint, Michigan, it shall be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensee in an amount not exceeding $250,000 for the willful and/or repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules.

12. IT IS FURTHER ORDERED, That, in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b)(3) of the Communications Act of 1934, as amended. The Commission has determined that, in every case designated for hearing involving revocation or denial of assignment, transfer, or renewal of license for alleged violations which also come within the purview of Section 503(b) of the Communications Act of 1934, as amended, it shall, as a matter of course, include this forfeiture notice so as to maintain the fullest possible flexibility of action. Accordingly, we stress that the inclusion of this notice is not to be taken as in any way indicating what the initial or final disposition of this case should be.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-299**

In the Matter of

Cavan Communications Corporation

Licensee of Station WTMS(AM)
Presque Isle, Maine

Order to Show Cause Why the
License for Station WTMS(AM)
Presque Isle, Maine Should
Not be Revoked

## ORDER TO SHOW CAUSE AND HEARING DESIGNATION ORDER

**Adopted: November 12, 1993; Released: November 30, 1993**

By the Chief, Audio Services Division:

1. The Chief, Audio Services Division, Mass Media Bureau, has before him for consideration: (a) the license held by Cavan Communications Corporation ("Cavan") for Station WTMS(AM), Presque Isle, Maine; and (b) the results of an investigation into WTMS(AM)'s silent status.[1]

2. The Commission's records indicate that WTMS(AM) has been off the air since March 29, 1991.[2] The licensee's last request for authority to remain silent, dated March 22, 1993, indicated that the station had been silent due to financial difficulties and that a memorandum of understanding had been reached for the sale of the station to a new owner. Authority to remain silent was granted through June 30, 1993 by letter, dated March 30, 1993, from the Chief, AM Branch, Audio Services Division, Mass Media Bureau. In that letter, Cavan was advised that any future requests for authority to remain silent must be accompanied by a detailed summary of steps being taken to return WTMS(AM) to on-air operations. By letter dated July 26, 1993, the Chief, AM Branch wrote Cavan stating that Commission records showed that WTMS(AM) has been off the air without authority, and required Cavan to request an extension of its silent authority or to return the station's authorization. Cavan has not responded to the letter.

3. Inasmuch as Cavan has neither requested an extension of its silence authority nor demonstrated that causes beyond its control prevent it from resuming broadcast operations, Cavan is in apparent violation of Section 73.1740(a)(4)of the Commission's Rules.[3] Furthermore, because of the protracted period of time in which the station has been silent, and because Cavan apparently lacks the ability and/or intent to restore WTMS(AM) to broadcast status, Cavan is also in apparent violation of Section 73.1750 of the Commission's Rules.[4]

4. Accordingly, IT IS ORDERED, That pursuant to Section 312(a)(3) and (4) of the Communications Act of 1934, as amended, Cavan Communications Corporation is DIRECTED TO SHOW CAUSE why the license for Station WTMS(AM) should not be REVOKED, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

(a) To determine whether Cavan Communications Corporation has the capability and intent to expeditiously resume broadcast operations of WTMS(AM) consistent with the Commission's Rules.

(b) To determine whether Cavan Communications Corporation has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.

(c) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Cavan Communications Corporation is qualified to be and remain the licensee of Station WTMS(AM).

5. IT IS FURTHER ORDERED, That, pursuant to Section 312(d) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the

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[1] The Mass Media Bureau has been delegated authority to issue and release Show Cause Orders in cases involving silent broadcast stations. *See Debrine Communications, Inc.*, 7 FCC Rcd 2118 (1992).

[2] The license renewal application (BR-901204UV) for WTMS(AM) was granted on March 27, 1991, for a period expiring on April 1, 1998.

[3] Section 73.1740(a)(4) provides:

> "In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary."

[4] Section 73.1750 provides:

> "The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation."

introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the MASS MEDIA BUREAU.

6. IT IS FURTHER ORDERED, That to avail it the opportunity to be heard, the licensee, pursuant to Section 1.91(c) of the Commission's Rules, SHALL FILE with the Commission within thirty (30) days of the receipt of this Order a WRITTEN APPEARANCE stating that it will appear at the hearing and present evidence on the matters specified in the Order. If the licensee fails to file a written appearance within the time specified, or within thirty (30) days of receipt of this Order the licensee files a written statement expressly waiving his right to a hearing, the licensee's right to a hearing SHALL BE DEEMED TO BE WAIVED. In the event the right to a hearing is waived, the Presiding Judge, or the Chief Administrative Law Judge if no Presiding Judge has been designated, SHALL TERMINATE the hearing proceeding and CERTIFY this case to the Commission in the regular course of business, and an appropriate Order shall be entered.[5]

7. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order revoking the license for WTMS(AM), Presque Isle, Maine it shall be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensee in an amount not exceeding $250,000 for the willful and/or repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That this document constitutes a NOTICE OF APPARENT LIABILITY for willful and repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules. The Commission has determined that in every case designated for hearing involving the potential revocation of a station license, it shall, as a matter of course, include a forfeiture notice so as to maintain the fullest possible flexibility of action. Since the practice of including such forfeiture notice is a routine procedure, such inclusion here should not be viewed in any manner as suggesting or otherwise indicating what the initial or final disposition of this proceeding should be.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

[5] The Mass Media Bureau has been delegated authority to issue Revocation Orders in cases involving silent broadcast stations. *See Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 90-162**

In the Matter of

Evaluation of the Syndication
and Financial Interest Rules

**ERRATUM**

**Adopted: November 22, 1993; Released: November 22, 1993**

By the Commission:

1. On October 22, 1993, the Commission released a *Memorandum Opinion and Order* (FCC 93-458) in the above-captioned proceeding, which added a new Section 73.663 to Part 73 of the Commission's Rules. In the *Memorandum Opinion and Order*, the Commission neglected to include the following note to Section 73.663 of the Commission's Rules, which is necessary to comply with Federal Register publication requirements:

> NOTE: The Commission shall publish a document in the Federal Register announcing the expiration of said Sections.

2. Accordingly, this Erratum amends Section 73.663 to include the above Note. For further information concerning this Erratum, contact David E. Horowitz, Legal Branch, Policy and Rules Division, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**
**November 23, 1993**

**IN THE MATTER OF LORETEL SYSTEMS, INC., PETITION FOR WAIVER OF THE DEFINITION OF "STUDY AREA" CONTAINED IN PART 36, SUBPART H, APPENDIX-GLOSSARY OF THE COMMISSION'S RULES AAD 93-132**

**Comments: December 3, 1993**
**Reply Comments: December 13, 1993**

On October 27, 1993, Loretel Systems Inc. (Loretel), on behalf of its subsidiary operating affiliate, Loretel Systems South, Inc., filed a petition for waiver of the definition of "study area" as set forth in Part 36, Subpart H, Appendix-Glossary of the Commission's Rules. This waiver would allow the consolidation of Loretel Systems South's study areas with Loretel's. Both companies would continue to operate on an average schedule basis.

Parties may file comments on this petition no later than **December 3, 1993.** Replies should be filed by **December 13, 1993.** Comments should reference AAD 93-132. A copy of each pleading should be sent to Sharon Brown, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C., 20037, (202) 857-3800. Copies are available for inspection and copying in the Accounting and Audits Division's public reference room, 2000 L Street, N.W., Room 812, Washington D.C.; copies are also available from (ITS).

For further information contact Sharon Brown at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**
**November 24, 1993**

# CARRIERS FILE PETITIONS ON BUREAU'S OCTOBER 12, 1993 SERVICE QUALITY MODIFICATIONS

**AAD 93-154**
**AAD 93-155**
**AAD 93-156**

**Comments: December 9, 1993**
**Reply Comments: December 20, 1993**

On November 12, 1993, several carriers filed petitions for reconsideration of the Bureau's October 12 order modifying service quality reporting requirements for price cap carriers (DA 93-1138). Petitions were filed by U S West Communications (US West), Ameritech, Southern New England Telephone Company (SNET), Bell Atlantic Telephone Companies (Bell Atlantic), Southwestern Bell Telephone Company (SWBT), Pacific Bell (Pacific), Nevada Bell (Nevada), and United States Telephone Association (USTA). The order made minor adjustments and clarifications of the existing price cap regulations, effective January 1994. The reconsideration proceeding is file number AAD 93-156. US West and the NYNEX Telephone Companies (NYNEX) have also filed waiver petitions requesting exemption from one or more of the requirements announced in the October 12 Order. US West seeks waiver of requirements regarding reporting of installation orders (rows 114 and 134). The US West waiver petition is file number AAD 93-154. NYNEX seeks waiver, for one quarter, of the same requirements. The NYNEX waiver petition is file number AAD 93-155.

Parties may file comments on these petitions no later than **December 9, 1993.** Replies should be filed by **December 20, 1993.** Comments on reconsideration petitions should reference AAD 93-156; comments on the US West waiver petition should reference AAD 93-154; comments on the NYNEX waiver petition should reference AAD 93-155. A copy of each pleading should be sent to Jacqueline Spindler, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to International Transcription Services (ITS), 2100 M Street, N.W., Suite 140, N.W., Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division's public reference room, 2000 L Street, N.W., Room 812, Washington, D.C.; copies are also available from ITS.

For further information contact Jacqueline Spindler at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Cook Electric, Inc. NAL/Acct. No. 315VB0012
Stuart, Florida

**ORDER ON RECONSIDERATION**

**Adopted: November 23, 1993; Released: December 1, 1993**

By the Chief, Field Operations Bureau:

## I. INTRODUCTION

1. The Chief, Field Operations Bureau, pursuant to authority delegated under Section 0.311(d)(1) and 1.106 of the Rules, 47 C.F.R. § 0.311, 1.106, has under consideration the Petition for Reconsideration filed by Cook Electric, Inc. Petitioner requests reconsideration of the $8,000 Forfeiture Order issued to it by the Vero Beach Office of the Field Operations Bureau on December 2, 1992, for violating Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. § 301. For the reasons noted herein, the monetary forfeiture is reduced to $6,400.

## II. BACKGROUND

2. During an October 1992 survey of land mobile licensees conducted by an employee of the FCC's Vero Beach Office, Petitioner was unable to produce an authorization for the transmitter it had installed at its business location. On November 5, 1992, the Vero Beach Office issued an $8,000 Notice of Apparent Liability to Petitioner. Subsequent discussions between the Vero Beach Office and Cook Electric, Inc., representatives confirmed that the company lacked any authorization for its transmitter.

## III. DISCUSSION

3. Petitioner admits to operating a transmitter without an authorization, but argues that the amount of the forfeiture should be reduced in accordance with the adjustment criteria discussed in the FCC's *Policy Statement* for assessing forfeitures.[1] In support of its argument for a reduction of the amount of the forfeiture, Petitioner argues that the violation should be viewed as "minor" because the communications had occurred on a frequency which is used on a shared basis by many licensees, and use of it had not resulted in harm to any licensees. Petitioner also argues that mitigation is warranted in so far as the violation occurred as the result of an oversight rather than deliberate wrongdoing. Company officers believed that the transmitter was properly licensed because they had submitted license application documents through its communications service provider, Radiotronics, Inc. Further, Petitioner argues that the officers took immediate action to remedy the omission by applying again. In further support of its argument that the amount of the forfeiture should be adjusted downward, Petitioner also cites to Cook Electric, Inc.'s history of overall compliance with Commission Rules, and has also submitted financial documents to support its contention that Cook Electric cannot afford to pay the $8,000 forfeiture.

4. We disagree with Petitioner's argument that the violation should be considered minor because that radio service uses shared frequencies. Unlicensed operation is a serious matter because it impinges on other users. There is also no evidence to support Petitioner's contention that it had submitted a timely application for a license. We also reject the argument that Petitioner's quick action in applying for the license once the omission had been disclosed warranted further mitigation. Although failure to remedy may provide a basis for increasing a forfeiture amount, subsequent remedial action does not nullify the forfeiture penalty. *See Station KGLV, Inc.*, 42 FCC 2d 258, 259 (1973).

5. We agree with Petitioner that Cook Electric's history of overall compliance should be taken into consideration in determining the amount of the forfeiture. Since Commission records reflect no enforcement actions against Cook Electric, Inc., we think it is appropriate to reduce the amount of the forfeiture.

6. With respect to Petitioner's argument that its business earnings do not allow it to pay a forfeiture of $8,000, we note that Petitioner's gross revenues for the years 1989-1991 indicate that the company is financially able to pay the forfeiture amount of $6,400.[2]

## IV. CONCLUSION

7. For the reasons discussed above, we find that Cook Electric, Inc. is liable for violating Section 301 of the Communications Act by operating a transmitter in the business radio service without a license.

## V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. ? 1.80, that Cook Electric, Inc. IS LIABLE FOR A MONETARY FORFEITURE in the amount of $6,400 for operating an unlicensed station in violation of Section 301 of the Communications Act.

9. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. § 1.80(f)(3), that Cook Electric, Inc. shall, within 30 days of the release of this Order, pay the full amount of the forfeiture. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. The remittance should be marked "NAL/Acct No. 315VB0012 and mailed to the following address:

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[1] *1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993)

[2] In *PJB Communications of Virginia*, 7 FCC Rcd 2088-89 (1992), the Commission stated that, in general, use of a licensee's gross revenues as an indicator of a licensee's ability to pay a forfeiture is reasonable and appropriate, and may be the best indicator of the company's financial condition for forfeiture purposes.

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

All other correspondence, including requests to pay in installments, should be sent to:

Federal Communications Commission
Billings and Collections Branch
Mail Stop 1110A2
1919 M Street, N.W.
Washington, D.C. 20554
ATTN: NAL Acct No. 315VB0012

10. IT IS FURTHER ORDERED that this Order shall be sent, by certified mail, return receipt requested, to Cook Electric, Inc., 4250 SE Commerce Avenue, Stuart, Florida 34997.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

ROGER D. BOULDIN AND RAYMOND DEAKINS — File No. BPH-920123ME

For Construction Permit
for a New FM Station on Channel 276A
in Tusculum, Tennessee

## MEMORANDUM OPINION AND ORDER

**Adopted: November 15, 1993; Released: December 1, 1993**

By the Commission:

1. The Commission has under consideration a petition for reconsideration filed on May 18, 1992 by Roger D. Bouldin and Raymond Deakins ("Bouldin"), a general partnership. Bouldin requests reconsideration of the action of the Mass Media Bureau ("Bureau") returning its captioned application as unacceptable for tender.[1] *See Letter from Chief, FM Branch to Bouldin*, dated April 17, 1992. We deny the petition for the reasons set forth below.

## BACKGROUND

2. On January 23, 1992, Bouldin filed an application for a construction permit for a new commercial FM station at Tusculum, Tennessee. The application was timely filed during the appropriate filing window, as were two other competing applications.[2] In reviewing the applications, the Bureau found that pages 14 and 15 of the engineering section (Section V-B of Form 301) was omitted from Bouldin's application and therefore returned the Bouldin application as unacceptable for tender.

## DISCUSSION

3. In its petition for reconsideration, Bouldin states that it "was very meticulous and laborious in the preparation of the application" and that the missing pages had in fact been filled out.[3] Nevertheless, it concedes that, through inadvertence, pages 14 and 15 were not associated with the application. Bouldin believes that "the omission of those pages resulted after the application was completed and was being photocopied."[4] Bouldin argues that "[a] careful examination of the . . . application reveals that virtually all the information that would have been detailed on Pages 14 and 15 ... is readily obtainable from other parts of the application and its associated exibits." Therefore, Bouldin concludes that its application should be regarded as "substantially complete" and accepted for tender. We disagree.

4. In the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936, published May 13, 1985 ("Report and Order"),[5] the Commission, seeking to deter the filing of carelessly prepared, unprocessable applications, adopted a "hard look" approach to processing commercial FM broadcast applications. Under this approach, applications which are not substantially complete at tender are to be returned to the applicant, thereby losing their filing status. *Id.*, para. 23. The criteria for determining "substantial completeness" are set forth in the *Report and Order* at Appendix D, reprinted at 7 FCC Rcd 5083. Therein, we identified compliance with the Commission's technical rules as an element which is critically important to the processability of the application. We explained:

> Compliance with the Commission's technical rules is evaluated in the course of an acceptability study. Certain engineering data must be present for such a technical acceptability study to be made. The absence

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[1] The Bureau has referred the Bouldin petition for reconsideration to the Commission, pursuant to 47 C.F.R. § 1.104(b).

[2] The competing applications of Darrell Bryan (File No. BPH-920109MA) and SBH Properties, Inc. (File No. BPH-920123MD) were found to be acceptable for tender and for filing and therefore were designated for a comparative hearing. *See Darrell Bryan*, Hearing Designation Order in MM Docket No. 93-241, released August 31, 1993. SBH Properties has filed an opposition to the Bouldin petition.

[3] A copy of the missing pages is attached as Exhibit 3 to the Bouldin petition. In this regard, we note that Bouldin is not permitted to cure its tenderability defects by late-filed amendment. *See* 47 C.F.R. § 73.3522 (a) (6) (1991) (tenderability defects may not be cured by amendment after the close of the application filing window); *FM 104.9 Broadcasting*, 8 FCC Rcd 1393, 1393-1394 (1993), *recon. pending; Star Signal Corp.*, 1 FCC Rcd 450 (1986); *see also JEM Broadcasting Company, Inc.*, 7 FCC Rcd 4324 (1992), *recon. denied*, 8 FCC Rcd 77 (1992); *Pike Family Broadcasting Inc.*, 6 FCC Rcd 5552, 5553-5554 (1991), *recon. denied*, 7 FCC Rcd 4250 (1992), *further review denied*, 8 FCC Rcd 2678 (1993); *Quinto Broadcasting Corp.*, 6 FCC Rcd 5550-5551 (1991).

[4] As Bouldin has requested, the Bureau staff has checked and verified that neither the original application nor any of the copies filed with the Commission contains the missing pages. Also, we note that while Bouldin speculates on the cause of its omission of the engineering data, it has not proffered any evidence that the Commission was in any manner responsible for it. Regardless of whether or not the omission occurred as a result of a problem in the photocopying process, the applicant bears the full burden of its (or its agents') failure to file a complete application. *RDH Communications, Limited Partnership*, 6 FCC Rcd 4764-4765 (1991), *recon. denied*, 7 FCC Rcd 5564 (1992), *further recon. dismissed*, FCC 93-415, released August 30, 1993; *Northland Broadcasters, A Limited Partnership*, 4 FCC Rcd 6508-09 (MM Bur. 1989).

[5] *Recon. denied*, 50 Fed. Reg. 43157 (October 25, 1985), *aff'd sub nom. Hilding v. FCC*, 835 F.2d 1435 (9th Cir. 1987). The *Report and Order* was reprinted at 58 RR 2d 776 (1985). *See also Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991) (affirming Commission application of "hard look" processing standards). The Commission recently modified the "hard look" processing rules, and made these revised rules effective as of August 7, 1992. *Report and Order, Commercial FM Broadcast Applications*, MM Docket No. 91-347, 7 FCC Rcd 5074 (1992). The Commission determined that applications filed prior to that date would continue to be processed under the rules in effect on the date of the application's receipt. *Id.* at 5079. Bouldin's application was filed on January 23, 1992, and therefore is subject to the processing rules then in effect.

of one or more elements of those data, listed below, prevents a determination of acceptability and thus renders the application not substantially complete.

a. The geographic coordinates, to the nearest second, of the proposed transmitter site must be provided....

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c. The channel number and community of the allocation must be supplied. . . .

d. Effective Radiated Power must be specified. . . .

e. Also necessary are the antenna heights above average terrain, above ground level, and above mean sea level. . . .

f. An Answer to Item 7, Section V-B must be provided, as whether or not a directional antenna is proposed is a fundamental issue. . . .

*Id.*, App. D, at para. 4, 7 FCC Rcd at 5085-5087.

5. All of the above engineering data is to be provided on pages 14 and 15 of the application form. As of the close of the application filing window for the Tusculum, Tennessee allotment, on January 23, 1992, the Bouldin application undisputedly did not contain these pages. Therefore, the essential engineering data was omitted from the application. Bouldin's argument that some of the missing data could be derived from other portions of the application or its exhibits is unpersuasive. As a matter of processing policy, Appendix D expressly provides that "[i]f any of the above information is missing, the application will be returned as not sufficient for tender." 7 FCC Rcd at 5087. Although Appendix D also provides for a limited exception to this general policy to permit an examination of the four corners of an application in cases where the application contains all necessary information but the information is visibly incorrect or inconsistent, that exception is inapposite, since the application did not contain all necessary information. Therefore, the application was properly returned as insufficient for tender. *See DaSan Communciations Corp.*, 7 FCC Rcd 7550, 7551 (1992); *Sumter Radio Partnership*, 7 FCC Rcd 5539, 5540 (1992); *Radio Lompoc L.P.*, 7 FCC Rcd 3798, 3799 (1992); *Star Signal Corp.*, 1 FCC Rcd 450, 451 (1986).

6. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed on May 18, 1992 by Roger D. Bouldin and Raymond Deakins IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 91-210**

In re Applications of

Robert D. Janecek d/b/a LION'S SHARE BROADCASTING — File No. BPH-900504MD

LOMPOC MINORITY BROADCASTERS PARTNERSHIP — File No. BPH-900518MO

For Construction Permit for a New FM Station on Channel 285A, Lompoc, California

**Appearances**

*David Tillotson* on behalf of Robert D. Janecek d/b/a Lion's Share Broadcasting; *Benjamin Perez* on behalf of Lompoc Minority Broadcasters Partnership; and *Charles E. Dziedzic* and *Y. Paulette Laden* on behalf of Mass Media Bureau.

**DECISION**

**Adopted: November 18, 1993; Released: December 6, 1993**

By the Review Board: MARINO (Chairman), BLUMENTHAL and GREENE.

Board Member GREENE:

1. Before the Review Board is the *Initial Decision* of Administrative Law Judge Joseph P. Gonzalez, 8 FCC Rcd 916 (1993), which granted the application of Lion's Share Broadcasting for a new FM station in Lompoc, California, and denied the competing application of Lompoc Minority Broadcasters Partnership (LMBP). LMBP has excepted to this ruling, and Lion's Share has filed contingent exceptions. Both have replied.

2. These applications and two others were designated for hearing under the standard comparative issue, which is governed by the considerations set forth in *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (*Comparative Policy Statement*). The ALJ subsequently added issues against LMBP to determine whether it made material misrepresentations or lacked candor when it certified to reasonable assurance of both a transmitter site and the availability of funds. *Memorandum Opinion and Order*, FCC 92M-552 (released May 12, 1992). The ALJ resolved the false financial certification issue in LMBP's favor. *I.D.* at ¶ 17. However, he found that LMBP made a material misrepresentation about having reasonable assurance of a site, "which requires that LMBP be found unqualified." *Id.* at ¶ 15. In the event that this disqualification would be reversed on appeal, the ALJ contingently concluded that Lion's Share is the comparatively superior applicant, a point which neither applicant disputes.

3. LMBP argues that Lion's Share's application should have been returned without consideration under the Commission's "hard look" processing standards because it failed to meet Commission tenderability standards when filed. This point was addressed in the *Hearing Designation Order*, 6 FCC Rcd 4465 (Mass Med. Bur. 1991) (*HDO*), however, and Lion's Share was allowed to correct the deficiency in its contour overlap showing because the governing rule had not afforded applicants full and explicit notice of the showing needed to withstand "hard look" scrutiny, as required by *Salzer v. FCC*, 778 F.2d 869, 871-72 (D.C. Cir. 1985) ("fundamental fairness . . . requires that an exacting application standard, enforced by the severe sanction of dismissal without consideration on the merits, be accompanied by full and explicit notice of all prerequisites for such consideration."). *Accord Malkan FM Associates v. FCC*, 935 F.2d 1313, 1318-19 (D.C. Cir. 1991). This analysis of Lion's Share's application was approved in *Radio Lompoc Limited Partnership*, 7 FCC Rcd 3798, 3800 ¶ 9 (1992). Disposition of an issue in the *HDO* is controlling where, as here, "specific reasons are stated for [the Commission's] action or inaction in a designation order . . . ." *Atlantic Broadcasting Co.*, 5 FCC 2d 717, 721 (1966). Applications for review of such orders "shall be deferred until applications for review of the final Review Board Decision in the case are filed." 47 CFR 1.115(e)(3). Thus, review of this issue is beyond the Board's authority.

4. Lion's Share was directed to submit a curative amendment to the ALJ within thirty days of the release of the *HDO*. 6 FCC Rcd at 4468 ¶ 25 (released July 24, 1991). However, before the thirty-day period had expired, the ALJ suspended all procedural dates pending the results of settlement efforts among the parties. *Order*, FCC 91M-2589 (ALJ released Aug. 20, 1991). Lion's Share did not file its amendment until February 10, 1992, twenty-six days after the ALJ's January 15, 1992 hearing conference at which new procedural dates were set. *See Order*, FCC 92M-73 (ALJ released Jan.17, 1992). In its accompanying pleading Lion's Share explained it had been delayed for about ten days in preparing the amendment due to the unavailability of the site owner. Lion's Share Petition for Leave to Amend at 2-3 n.2 , Feb. 10, 1992. The ALJ found that "the submission of this amendment was timely in view of the fact that procedural dates in this proceeding were suspended from August 20, 1991 until January 15, 1992." *Order*, FCC 92M-449 (ALJ released Apr. 13, 1992). He also found good cause for the amendment.

5. LMBP complains that the ALJ erred in accepting the amendment because, in its view, the amendment was not diligently filed. Its argument that Lion's Share was put on notice of its problem by its competitors' fully spaced applications is answered by the *HDO*, which gave Lion's Share the opportunity to amend and is not appealable here.[1] Its further argument is that the ALJ's suspension of

[1] In *Eugene Walton*, 6 FCC Rcd 4236 (Rev. Bd. 1991), upon which LMBP relies, the Board sought comment as to whether an amendment filed after the applicant had been denied a short-spacing waiver could meet diligence and unforeseeability tests. (For a description of the elements of a good cause showing, see note 3, *infra*.) The Board subsequently found a lack of

procedural dates should not suspend the deadline for amending provided by the *HDO*,[2] or, in the alternative, if the amendment period was tolled, Lion's Share had only five days left of the period when the ALJ reinstated procedural dates. 47 CFR 73.3522(b)(2) upon which LMBP relies provides that amendments relating to issues first raised in a hearing designation order "may be filed as a matter of right within 30 days after that Order or a summary thereof is published in the FEDERAL REGISTER, or by a date certain to be specified in the Order," which, in this case was thirty days after the *HDO*'s release. An amendment filed outside this period must be accompanied by a showing of good cause for late filing, *see* 47 CFR 73.3522(b)(1), which Lion's Share provided.[3] Under the circumstances here, *i.e.*, the *HDO* 's direction to file an amendment, the ALJ's suspension of procedural dates before the amendment period expired, and Lion's Share's expeditious filing of an amendment once the proceeding was resumed, we cannot say that the ALJ abused his discretion in 47 CFR 1.243(i) by accepting the amendment.[4]

6. With the amendment, Lion's Share's application meets the Commission's technical requirements for a new FM station in Lompoc, and there are no other questions outstanding about its other qualifications. We need not reach the questions about LMBP's qualifications because, even if LMBP is fully qualified for a broadcast license, Lion's Share is without dispute the comparatively superior applicant.[5] In its *Comparative Policy Statement* the Commission explained that two primary factors govern the selection among qualified applicants for a new broadcast station.[6] Maximum diversification of control of the media of mass communications, a factor of primary importance,

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good cause in *Eugene Walton*, 6 FCC Rcd 6071, 6074-75 (1991), *rev. denied*, 7 FCC Rcd 3237, *recon. denied*, 7 FCC Rcd 6037 (1992), because the applicant had an opportunity to specify an acceptable site after learning that its site did not meet the Commission's spacing ' requirements but chose, instead, to seek a waiver of the rule. Lion's Share has not sought a waiver; its situation is analogous to the applicants in *Walton* whose amendments curing short-spacing problems were accepted.

[2] The Mass Media Bureau disagrees with LMBP's interpretation:

> LMBP insists that Lion's Share should have filed its amendment notwithstanding the fact that procedural dates were in suspension. But the precise purpose of suspending procedural dates pending settlement is to free applicants from the burden, financial and otherwise, of prosecuting their applications. This includes, of course, the burden of preparing an engineering amendment, as well as the burden of opposing one.

Mass Media Bureau Reply Brief at 6.

[3] To show good cause:

> [T]he applicant must demonstrate that it has acted with due diligence, that the amendment was not required by its voluntary act, that no additional issues or parties would be required, that the hearing process will not be disrupted, that there will be no prejudice to competing applicants, and that the applicant will not gain a comparative advantage. In addition to these usual good cause criteria, Section 73.3522(b)(1) of the Rules requires that an applicant seeking to amend its engineering proposal following designation show "that the amendment is necessitated by events which the applicant could not reasonable have foreseen . . . ."

*California Broadcasting Corp.*, 90 FCC 2d 800, 808 (1982), citing *Erwin O Connor Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970).

[4] LMBP's real complaint is that, had the Lion's Share application been rejected from the outset, its own application might have avoided the scrutiny it received from Lion's Share. But, an applicant does not have a vested interest in the disqualification of its opponent. *See Crosthwait v. FCC*, 584 F.2d 550, 555 (D.C. Cir. 1978).

[5] *See Deep South Broadcasting Co. v. FCC*, 278 F.2d 264, 266 (D.C. Cir. 1960) ("An agency, like a court, need not decide questions which are not relevant to its decision."). With respect to the question of whether LMBP made a material misrepresentation or was lacking in candor when certifying that it had reasonable assurance of a site, we note that the ALJ reached his adverse conclusion because LMBP principal Richard Keating did not have reasonable assurance of the site he identified when he executed LMBP's certification. *See I.D.* at ¶ ¶ 14-15. (It turned out that the putative landowner whom Keating had contacted did not own the land, and this putative landowner had referred Keating to his attorney for a discussion of details. Keating could not confer with the attorney until after he had made the certification; when he did reach the attorney, he learned that the land was owned by someone else.) The ALJ, however, did not make any findings as to whether Keating's intent when executing the certification was fraudulent. The *sine qua non* of misrepresentation or a lack of candor is fraudulent intent. *See Leflore Broadcasting v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980); *Character Policy Statement*, 102 FCC 2d 1179, 1196 (1986) (subsequent history omitted); *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983), *recon. dismissed*, FCC 811-43 (released Apr. 20, 1983). Keating quickly contacted Stanley Hollister, the landowner, after learning his identity--after certifying to his site. *I.D.* at ¶ ¶ 14-15. Hollister gave Keating a letter but then testified at tr. 143:

> [LMBP] had indicated that they had to have some type of negotiations going on for an antenna site in order to apply for a broadcasting permit. And if we would sign something to the effect that they had talked to us and it would be available that that would suffice as far as that was concerned. That was my recollection.

Hollister continued at tr. 143-44:

> Well, yes, I had agreed that we would do a -- go into conversations about the property if that would be what would possibly help them get their permit but that nothing other than just talking about it is all we would do.

On cross examination, Hollister was asked at tr. 147:

> Q So it was fair to say that you really never in your mind intended to lease the property to Mr. Keating?
>
> A Never really had any intention to, no.

Should Lion's Share's comparative superiority ultimately not prove to be controlling here, a remand would be necessary to determine whether, after certification, LMBP had reasonable assurance of access to a site on Hollister's land and whether LMBP made material misrepresentations or was lacking in candor regarding this matter. *See I.D.* at ¶ 15.

[6] *See Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) (requiring the FCC to confront challenges to integration policy and, when the policy is challenged, to articulate reasons why the policy should be applied to a particular case); *accord Flagstaff Broadcasting Foundation v. FCC*, 979 F.2d 1556, 1567 (D.C. Cir. 1992). The Commission has said the integration factor continues to govern the analysis of comparative proceedings pending the Commission's *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664

favors an applicant who owns no other media interests over one who does. 1 FCC 2d at 394-95. Full time participation in station operation by owners, a factor of "substantial importance" generally referred to as "integration," focuses on the extent to which owners will participate in station management. *Id.* at 395-96. Neither applicant has any broadcast or other mass media ownership interests, although the ALJ assessed a "moderate [diversification] demerit" against LMBP because one of LMBP's two principals had not made a timely commitment to resign from his position as general manager of two broadcast stations in California. *I.D.* at ¶ ¶ 11, 18.[7] Robert Janecek, who is an individual applicant doing business as Lion's Share, has promised to be integrated on a full time basis; LMBP has not proposed any integration.[8] Thus, as the ALJ concluded, *I.D.* at ¶ 18, Lion's Share is the comparatively superior and preferred applicant.

7. ACCORDINGLY, IT IS ORDERED That the Motion to Strike Brief and Exceptions of Lompoc Minority Broadcasters Partnership and to Dismiss Lompoc Minority Broadcast Partnership's Application filed by Lion's Share Broadcasting IS DENIED; and that the Erratum and corrected Brief and Exceptions of Lompoc Minority Broadcasters Partnership ARE ACCEPTED.

8. IT IS FURTHER ORDERED That the application of Robert B. Janecek, d/b/a Lion's Share Broadcasting (File No. BPH-900504MD) IS GRANTED, and the application of Lompoc Minority Broadcasters Partnership (File No. BPH-900518MO) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

(1992). Neither Lion's Share nor LMBP has questioned the applicability of the *Comparative Policy Statement* to this proceeding.

[7] In its Brief at 4-5, LMBP says that it "was awarded 100% credit for having no attributable media interests by the ID." It does not explain how the *I.D.* might have erred in assessing the demerit for its principal's position as general manager of other stations.

[8] "LMBP did not propose ownership integration into management . . . ." LMBP Reprinted Brief at 4.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

WILTEL, INC.,
Complainant,

v. File No. E-93-130

SOUTHERN NEW ENGLAND
TELEPHONE CO.,
Defendant.

**ORDER**

**Adopted: November 23, 1993; Released: December 2, 1993**

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 28, 1993, Wiltel, Inc. (Wiltel) filed the above-captioned formal complaint seeking damages from Southern New England Telephone Company (SNET) with respect to SNET's alleged violation of the Commission's rate of return prescription for the 1989-1990 monitoring period.

2. The parties filed a joint motion to dismiss on November 15, 1993. In support of their motion, the parties state that they have resolved all issues in dispute and request that the proceeding be dismissed with prejudice.

3. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources by the Commission and the parties.

4. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss filed on November 15, 1993 IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

MIDCO COMMUNICATIONS, INC.
Complainant

v. File No. E-93-152

U S WEST COMMUNICATIONS, INC.
Defendant

**ORDER**

**Adopted: November 24, 1993; Released: December 3, 1993**

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 30, 1993, Midco Communications, Inc. (Midco) filed the above-captioned complaint against U S WEST Communications, Inc. (U S WEST) seeking damages resulting from U S WEST's alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990. On November 19, 1993, however, Midco and U S WEST filed a joint motion to dismiss the complaint with prejudice stating that a mutually agreeable settlement of all pending controversies has been reached.

2. We are satisfied that granting the parties' motion to dismiss the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PR Docket No. 92-289**

In the Matter of

| | |
|---|---|
| Amendment of the Amateur Service | RM-7868 |
| Rules Concerning the 222-225 MHz and | RM-7869 |
| 1240-1300 MHz Frequency Bands. | RM-7888 |

**REPORT AND ORDER**

**Adopted: November 19, 1993; Released: December 2, 1993**

By the Commission:

## I. INTRODUCTION

1. On November 30, 1992, we adopted a *Notice of Proposed Rule Making* (*Notice*),[1] in the above-captioned proceeding. In response to three petitions requesting changes to the Rules for the amateur service, we proposed (1) to create a subband in the 222-225 MHz (1.25 m)[2] band where repeaters would be prohibited, (2) to authorize frequency privileges for Novice Class operators in the entire 1.25 m band, and (3) to allow Novice Class operators to be licensees and control operators of repeaters in the 1.25 m band as well as in the 1270-1295 MHz segment of the 1240-1300 MHz (23 cm) band. We are adopting the proposed rules with respect to the establishment of a subband and authorization of privileges for Novices in the entire 1.25 m band. We decline, however, to adopt the proposal relating to Novices as control operators and licensees of repeaters in the 1.25 m and 23 cm bands.

## II. DISCUSSION

### Establishing a protected subband in the 1.25 m band

2. We received many comments in this proceeding both favoring and opposing the creation of a small frequency subband for experimentation at 222.00-222.15 MHz where repeater operation would not be allowed. Proponents of such a subband believe that it is essential to their operations to be protected from repeater transmissions which are primarily for operational purposes, rather than experimental. It is undisputed that experimental communications and repeater transmissions are incompatible because of the lengthy periods of channel occupancy by a repeater. Commenters favoring the proposal contend that the technical challenges of experimentation best serve the basic purposes of the amateur service to advance the art of radio and to provide opportunities for improving communication and technical skills.[3] The American Radio Relay League, Inc. (ARRL) strongly supports a subband and argues that it is necessary to create it by rule, rather than to rely on voluntary repeater coordination, because of the need for uniformity of the subband nationwide and because there is no enforcement authority for the band-planning decisions of a volunteer coordinating body.[4]

3. Some opponents of the subband proposal reject a mandatory segment where repeaters would be disallowed. They believe that each local area should be allowed to provide its own band plan specifying different modes of operation to accommodate local needs.[5] Several commenters located in California oppose a subband for experimentation at 222.00-222.15 MHz arguing that they would lose their ability to communicate with users in Nevada. They request that the proposed subband be established at 222.00-222.13 MHz rather than as proposed in order to permit their auxiliary operations to continue on a channel at 222.14 MHz.[6]

4. We have considered carefully the comments for and against establishing a protected subband. In our view, the public interest requires that there be sufficient opportunities available for experimental activities. Further, it is not feasible to rely on local frequency coordinating bodies to assure that all types of amateur service operations will be accommodated. In this instance, we agree with the ARRL that it is desirable that there be a uniform, nationwide subband where experimental operations can take place unaffected by repeater use. We regret that there may be some disruption to the activities of some repeater and auxiliary stations. We would be remiss, however, if we failed to provide the protection requested for experimental activities. We conclude, therefore, that the public interest would be served by establishing a protected subband at 222.00-222.15 MHz.

### Novice Class operator privileges

5. The proposal to expand the privileges of Novice Class operators by authorizing them the entire 1.25 m band[7] met with a very favorable response from the commenters.[8] There is general agreement that authorizing Novice Class

[1] 7 FCC Rcd 8000 (1992).

[2] Because the amateur service frequency bands are not identical in all three international Telecommunication Union (ITU) regions, the amateur community worldwide refers to radio spectrum in terms of approximate wavelength expressed in meters (m). Part 97 of the Commission's Rules, 47 C.F.R. §§ 97.1-97.527, also uses this terminology to designate frequency bands. The frequency band 222-225 MHz, therefore, is designated as the 1.25 m band, and the 1240-1300 MHz band is designated as the 23 centimeter (cm) band.

[3] Comments of Steve Noll at 1, Frank Carroll, Jr. at 1, and Western States VHF-Microwave Society at 9.

[4] Comments of ARRL at 4 and 5.

[5] Comments of John K. Wilson at 1 and David Stephens at 1.

[6] Comments of Donald McDougall at 1, Gregory Engle at 1, Ghery S. Pettit at 1, and Stephen F. Merchant at 1.

[7] Section 97.301(f) of the Commission's Rules, 47 C.F.R. § 97.301(f), currently authorizes to Novice Class operators the segment 222.10-223.91 MHz in International Telecommunications Union (I.T.U.) Region 2. The 1.25 m band is not authorized to the amateur service in I.T.U. Regions 1 and 3.

[8] Comments of David E. Stephens at 1, Robert J. Carpenter at 2, and ARRL at 10.

operators additional frequency privileges will provide an opportunity for them to become proficient in a wider variety of amateur service operations. In addition, Novice Class operators will have more flexibility in selecting the mode of transmission that they want to use. For these reasons, we are amending the rules to allow Novice Class operators privileges in the entire 1.25 m band.

**Novice Class operators as licensees of repeaters.**

6. There is significant opposition to our proposal to permit Novice Class operators to serve as licensees and control operators of repeaters in the 1.25 m and 23 cm bands. Several commenters are concerned because the Novice Class operator license examination has not required the specific knowledge about repeaters needed to insure a high standard of operation.[9] The ARRL also argues that because the codeless Technician Class operator license permits repeater operation and is more popular as an entry-level license than the Novice Class operator license, there is no need now to expand Novice Class operator privileges to include repeater operation.[10]

7. In view of the lack of substantial support by the amateur community for granting Novice Class operators the additional privileges of being repeater licensees and control operators in these two bands, we are persuaded that the rules in this respect should not be amended. The arguments in opposition have merit insofar as they concern the lack of knowledge that current Novice Class operators[11] possess about repeater operation, and note that an alternate entry-level license, the codeless Technician Class operator license, permits a holder of such license to be a repeater licensee and control operator. In addition, if Novice Class operators were authorized the proposed repeater privileges, the written examination for the Novice license would need to be revised to include questions on the proper operation of repeaters. In the amateur service, each license class has specific privileges. The distinction between the Novice and Technician Classes would be diminished by granting Novices the proposed repeater privileges. We will not, therefore, adopt the proposed rule changes in this respect.

**Procedural Matter**

8. Mr. Kenneth A. Piletic filed late comments to RM-7888, the petition filed by Dr. Michael C. Trahos in this proceeding. Dr. Trahos then filed a Motion to Dismiss those late comments. In a reply filing, Mr. Piletic requested that the comments be considered as a response to the *Notice*.[12] Even though the comments to the petition were late, they were filed before the comment period closed on the *Notice*. Considering them will make for a more complete record. We will, therefore, deny the Motion to Dismiss.

## III. CONCLUSION

9. In summary, we have decided to amend the amateur service rules to create a small new subband at 222.00-222.15 MHz where repeaters are prohibited and to authorize frequency privileges for Novice Class operators in the entire 1.25 m band. We have further decided not to adopt the proposal that would have allowed Novice Class operators to be repeater licensees and control operators in the 1.25 m and 23 cm bands.

## IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that effective **February 1, 1994,** Part 97 of the Commission's Rules, 47 C.F.R. Part 97, IS AMENDED as set forth below. Authority for this action is found in Sections 4(i) and 303(c), (f), and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(c), (f), and (r).

11. IT IS FURTHER ORDERED that the Motion to Dismiss Late-Filed Comments, filed by Dr. Michael C. Trahos, IS DENIED.

12. IT IS FURTHER ORDERED that this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

**Part 97 - Amateur Radio Service**

1. The authority citation for Part 97 continues to read as follows:

**Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609, unless otherwise noted.**

2. Section 97.201(b) is revised to read as follows:

**§ 97.201 Auxiliary station.**

[9] Comments of ARRL at 10 and 11, Mark Dill at 2 and 3, William Tynan at 2, and Central States VHF Society at 2.

[10] Reply comments of ARRL at 10 and 11.

[11] As of September 28, 1993, there were 100,486 Novice Class licensees.

[12] The late comments to RM-7888 were inserted in the proceeding even before Mr. Piletic asked that they be considered. His comments are germane to the issue of expansion of Novice Class operator privileges. He, along with other commenters, believes that Novice Class operators do not have the knowledge needed to be repeater licensees and control operators. In this instance, we do not believe that consideration of Mr. Piletic's comments is prejudicial to Dr. Trahos.

* * * * *

(b) An auxiliary station may transmit only on the 1.25 m and shorter wavelength frequency bands, except the 222.00-222.15 MHz, 431-433 MHz, and 435-438 MHz segments.

* * * * *

3. Paragraph (b) of Section 97.205 is revised to read as follows:

**§ 97.205 Repeater station.**

* * * * *

(b) A repeater may receive and retransmit only on the 10 m and shorter wavelength frequency bands except the 28.0-29.5 MHz, 50.0-51.0 MHz, 144.0-144.5 MHz, 145.5-146.0 MHz, 222.00-222.15 MHz, 431.0-433.0 MHz, and 435.0-438.0 MHz segments.

* * * * *

4. The entry under VHF in Section 97.301(f) is amended by revising the frequencies authorized for use by Novice Class operators in ITU Region 2 to read as follows:

**§ 97.301 Authorized frequency bands.**

* * * * *

(f) For a station having a control operator holding a Novice Class operator license:

| Wavelength band | ITU Region 1 | ITU Region 2 | ITU Region 3 | Sharing requirements See § 97.303, Paragraph: |
|---|---|---|---|---|
| VHF | MHz | MHz | MHz | |
| 1.25 m | --- | 222-225 | --- | (a) |

* * * * *

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

IDB AERONAUTICAL COMMUNICATIONS, INC. File No. ITC-93-141

For Authority Pursuant to
Section 214 of the Communications
Act of 1934, as Amended, to
Interconnect with the Facilities
of MCI Telecommunications Corporation

**MEMORANDUM OPINION, ORDER AND AUTHORIZATION**

**Adopted: November 26, 1993; Released: December 3, 1993**

By the Chief, International Facilities Division:

1. The Commission has before it an application filed by IDB Aeronautical Communications, Inc., dba IDB Mobile Communications, (IDB) pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules and Regulations, 47 C.F.R. § 63.01, requesting authority to interconnect its coast earth station facilities and services with the domestic and international network of MCI Telecommunications Corporation, including MCI International, Inc. (collectively, MCI). IDB seeks this authority in order to facilitate the exchange of telecommunication services between points served by MCI and mobile earth stations in the Atlantic (AOR-West, AOR--East), Pacific (POR) and Indian Ocean (IOR) Regions served by IDB. The application appeared on public notice on March 31, 1993. No oppositions remain.[1]

2. IDB seeks authority to interconnect its existing facilities with the existing facilities of MCI. The interconnected facilities will be used to provide a variety of telecommunication services, such as analog voice, digital voice and data, compressed video, facsimile, telex, and packet switched data network services. Service in the POR and AOR-West will be provided using IDB's facilities at Niles Canyon, California. Service in the AOR-East will be provided on IDB's facilities at Staten island, New York, and service in the IOR will be provided by IDB's facilities at Perth (Gnangara), Australia. All services will be provided using the INMARSAT satellite system. IDB states that interconnection will serve the public interest, convenience and necessity by increasing customer choice and offering diverse routing arrangements. MCI's interconnection with IDB will enable MCI to route its traffic to either COMSAT or IDB.

3. We find that the interconnection proposed by IDB by this application will further the present and future public convenience and necessity by providing additional choices to customers in the maritime telecommunications market. Accordingly, IT IS ORDERED that application File No. ITC-93-141 IS GRANTED, and IDB IS AUTHORIZED, pursuant to Section 214 of the Communications Act of 1934 and Section 63.01 of the Commission's Rules and Regulations, to interconnect with MCI in the provision of maritime services as described herein.[2]

4. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li, Chief
International Facilities Division
Common Carrier Bureau

[1] COMSAT Corporation (COMSAT) filed a Partial Opposition to IDB's application on April 30, 1993, but withdrew its submission on November 12, 1993. We find no public interest issue arising out of COMSAT's pleading that warrants our independent action in this matter.

[2] IDB has been deemed "dominant" with respect to its provision of international mobile satellite services.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

IDB AERONAUTICAL COMMUNICATIONS, INC. File No. ITC-93-142

For Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Interconnect with the Facilities of American Telephone and Telegraph Company

**MEMORANDUM OPINION, ORDER AND AUTHORIZATION**

**Adopted: November 26, 1993; Released: December 3, 1993**

By the Chief, International Facilities Division:

1. The Commission has before it an application filed by IDB Aeronautical Communications, Inc., dba IDB Mobile Communications, (IDB) pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules and Regulations, 47 C.F.R. § 63.01, requesting authority to interconnect its coast earth station facilities and services with the domestic and international network of American Telephone and Telegraph Company (AT&T). IDB seeks this authority in order to facilitate the exchange of telecommunication services between points served by AT&T and mobile earth stations in the Atlantic (AOR-West, AOR-East), Pacific (POR) and Indian Ocean (IOR) Regions served by IDB. The application appeared on public notice on April 7, 1993. No oppositions remain.[1]

2. IDB seeks authority to interconnect its existing facilities with the existing facilities of AT&T. The interconnected facilities will be used to provide a variety of telecommunication services, such as analog voice, digital voice and data, compressed video, facsimile, telex, and packet switched data network services. Service in the POR and AOR-West will be provided using IDB's facilities at Niles Canyon, California. Service in the AOR-East will be provided on IDB's facilities at Staten island, New York, and service in the IOR will be provided by IDB's facilities at Perth (Gnangara), Australia. All services will be provided using the INMARSAT satellite system. IDB states that interconnection will serve the public interest, convenience and necessity by increasing customer choice and offering diverse routing arrangements. AT&T's interconnection with IDB will enable AT&T to route its traffic to either COMSAT or IDB.

3. We find that the interconnection proposed by IDB in this application will further the present and future public convenience and necessity by providing additional choices to customers in the maritime telecommunications market. Accordingly, IT IS ORDERED that application File No. ITC-93-142 IS GRANTED, and IDB IS AUTHORIZED, pursuant to Section 214 of the Communications Act of 1934 and Section 63.01 of the Commission's Rules and Regulations, to interconnect with AT&T in the provision of maritime services as described herein.[2]

4. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li, Chief
International Facilities Division
Common Carrier Bureau

[1] COMSAT Corporation (COMSAT) filed a Partial Opposition to IDB's application on May 7, 1993, but withdrew its submission on November 12, 1993. We find no public interest issue arising out of COMSAT's pleading that warrants our independent action in this matter.

[2] IDB has been deemed "dominant" with respect to its provision of international mobile satellite services.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. ITC-93-309

For Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Interconnect with the Facilities of Other U.S. Carriers to Provide Maritime Mobile Satellite Services

**MEMORANDUM OPINION, ORDER AND AUTHORIZATION**

**Adopted: November 26, 1993; Released: December 3, 1993**

By the Chief, International Facilities Division:

1. The Commission has before it an application filed by the American Telephone and Telegraph Company (AT&T) pursuant to Section 214 of the Communications Act of 1934, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules and Regulations, 47 C.F.R. § 63.01, requesting authority to interconnect with the facilities of IDB Aeronautical Communications, Inc. (IDB) and the COMSAT Corporation (COMSAT) for the purposes of providing maritime mobile satellite service between points in or reached via the United States on the one hand, and ships at sea in locations served by INMARSAT communications satellites in the Atlantic Ocean Region-West (AOR-West), the Atlantic Ocean Region-East (AOR-East), the Pacific Ocean Region (POR) and the Indian Ocean Region (IOR). AT&T also seeks authority to complete calls to international land mobile locations and temporary fixed locations that are indistinguishable from the maritime mobile satellite service. Public notice of the this application appeared on September 1, 1993 and no comments were filed.

2. The facilities for which AT&T seeks authorization will be used to provide AT&T-branded shore-to-ship maritime mobile satellite services with AT&T end-to-end rates between the United States and ships at sea via the INMARSAT satellites located in the AOR-West, AOR-East, POR and IOR. Services will include analog voice, digital voice and data and compressed video. AT&T seeks authority to provide its maritime mobile satellite service through interconnection with IDB's and COMSAT's authorized facilities obtained pursuant to contract. IDB, in turn, obtains INMARSAT space segment capacity from COMSAT. Service will be provided by means of IDB's earth station facilities, licensed to Southwest Communications, Inc., at Staten Island, New York (AOR-East (871) and AOR-West (874)), and Niles Canyon, California (POR (872)). Service in the IOR will be provided via IDB's earth station facility in Perth, Australia. COMSAT obtains INMARSAT space segment capacity directly from INMARSAT. Service will be provided through COMSAT's Southbury, Connecticut (AOR-East, AOR-West); Santa Paula, California (POR) and Anatolia, Turkey (IOR) coast earth stations.

3. The proposed earth station and space segment capacity will be interconnected pursuant to intercarrier agreements filed with the Commission, and rates paid to IDB and COMSAT will be contained in the intercarrier agreements. No new construction is involved in AT&T's proposal. AT&T states that grant of its application will serve the public interest by furthering competition and bringing to the public the benefits of alternative maritime mobile satellite services.

4. We find that the interconnection proposed by AT&T in this application will further the present and future public convenience and necessity by providing additional choices to customers in the maritime telecommunications market. Accordingly, IT IS ORDERED that application File No. ITC-93-309 IS GRANTED, and AT&T IS AUTHORIZED, pursuant to Section 214 of the Communications Act of 1934 and Section 63.01 of the Commission's Rules and Regulations, to interconnect with the facilities of IDB and COMSAT for the provision of maritime mobile satellite services as described herein.

5. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li, Chief
International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released:November 29, 1993

**PACIFIC BELL AND NEVADA BELL FILE PETITION FOR WAIVER OF THE COMMISSION'S PERCENT INTERSTATE USAGE REPORTING REQUIREMENT FOR SWITCHED TRANSPORT PHYSICAL COLLOCATION (CC DOCKET NO. 91-141, TRANSPORT PHASE I)**

**Pleading Cycle Established**

**COMMENTS DUE: December 16, 1993**
***REPLIES DUE:* January 4, 1994**

On November 18, 1993, Pacific Bell and Nevada Bell (together, Pacific) filed a petition for waiver of the Commission's requirement to base charges for physical collocation for switched transport service on percent interstate usage (PIU) reports. Pacific asserts that it does not currently have the capability to charge for Feature Group D traffic based on customer-reported PIU factors.

Interested parties filing comments or oppositions to this petition are invited to do so no later than **December 16, 1993.** Parties filing replies may do so no later than **January 4, 1994.** An original and five copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial copying firm, International Transcription Service, Suite 140, 2100 M Street, N.W., Washington, D.C. 20037. Also, one copy shall be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Copies of these petitions and other related documents may be obtained from International Transcription Service. The documents are also available for public inspection in Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Steven Spaeth, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-88**

In re Applications of

EZ COMMUNICATIONS, INC. File No. BRH-910401C2

For Renewal of License for
Station WBZZ (FM)
Pittsburgh, Pennsylvania

ALLEGHENY COMMUNICATIONS GROUP, INC. File No. BPH-910628MC

For Construction Permit for
a New FM Broadcast Station at
Pittsburgh, Pennsylvania

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 22, 1993; Released: December 6, 1993**

By the Commission:

1. By this Memorandum Opinion and Order we deny a Motion for Leave to File Application for Review and dismiss an Application for Review of a hearing designation order.[1] In the *HDO* the Bureau refused to designate issues concerning Allegheny's allegations of indecent programming, news distortion, civil misrepresentations, sexual discrimination, and abuse of the Commission's processes by EZ. Allegheny argues in the Motion for Leave to File Application for Review that the matters in its petition raise important issues of concern to the Commission, that immediate consideration of these matters would avoid a " probable and more disruptive remand at a later stage of this proceeding, and that needed clarification of policy and guidance to the staff can thus be provided. EZ and the Bureau argue that the Application for Review is procedurally deficient because the *HDO* is interlocutory and because the ALJ did not authorize Allegheny to file an application for review. 47 C.F.R. § 1.115(a)(3).

2. The *HDO* is an interlocutory order. Review is precluded under 47 C.F.R. § 1.115(e)(3) unless the matter is certified to the Commission by the ALJ. Here, the ALJ refused to certify this matter to the Commission on the ground that Allegheny had not made the showing required by Section 1.115(e)(3) that "the matter involves a controlling question of law as to which there is a substantial ground for difference of opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation." FCC 93M-218, released May 3, 1993. Allegheny's arguments that the rule should be waived to permit consideration of its contentions merely reflect its disagreement with the holdings of the *HDO*, which would always be a component of such a request, and thus we are convinced that the public interest in the orderly disposition of the Commission's business will be best served by denial of Allegheny's Motion for Leave to File Application for Review.

3. Consistent with *GAF Broadcasting Company, Inc.*, 8 FCC Rcd 5496, 5499 ¶ ¶ 19-21 (1993), one further matter warrants brief comment. In *GAF* we noted that allegations involving a licensee's violation of the Communications Act, Commission rules or Commission policy can be relevant in the determination of the weight to be given to a licensee's claim to a renewal expectancy. *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1232 fn.125 (1986). Thus, despite the *HDO*'s finding that no basic qualifying issues are warranted concerning the allegations against EZ, we wish to emphasize that the ALJ has discretion to add issues, based on a prima facie showing by Allegheny that EZ has violated the Communications Act, or the Commission's rules or policy, for consideration in conjunction with the renewal expectancy determination to be made in this proceeding. See *Metroplex Communications Inc.*, 4 FCC Rcd 8149, 8163 fn.11 (Rev. Bd. 1989), rev. den., 5 FCC Rcd 5610 (1990).

4. ACCORDINGLY IT IS ORDERED, That the Motion for Leave to File Application for Review, failed May 10, 1993 by Allegheny Communications Group, Inc. IS DENIED; and that the Application for Review filed May 10, 1993 by Allegheny Communications Group, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] Now before the Commission are the *Hearing Designation Order (HDO), EZ Communications, Inc.*, 8 FCC Rcd 2448 (Mass Media Bur. 1993); a Motion for Leave to File Application for Review and an Application for Review, both filed May 10, 1993 by Allegheny Communications Group, Inc.; and Oppositions to Motion for Leave to File Application for Review, filed May 14, 1993 by EZ Communications, Inc. and May 19, 1993 by the Mass Media Bureau.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 90-323**

In re Applications of

| | |
|---|---|
| HS COMMUNICATIONS, INC. | File No. BPH-880505MZ |
| STACY C. BRODY | File No. BPH-880505NO |
| PAMELA R. JONES | File No. BPH-880505NR |
| CRAIG L. SIEBERT | File No. BPH-880505PM |

For Construction Permit for
New FM Station, Channel 271A,
Virginia Beach, Virginia

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 22, 1993; Released: December 6, 1993**

By the Commission:

1. By this action the Commission denies Petitions for Reconsideration of *Memorandum Opinion and Order* (*MO&O*), 8 FCC Rcd 3237 (1993), filed June 9, 1993 by HS Communications, Inc. ("HS") and June 14, 1993 by Craig L. Siebert (Siebert).[1]

2. In this proceeding, Administrative Law Judge Edward J. Kuhlmann (ALJ) denied a post-hearing motion to reopen the record and add financial qualifications and real-party-in-interest issues against Stacy C. Brody (Brody).[2] He ultimately denied HS and Siebert all integration credit, awarded 100% integration credit to Brody, and granted the permit to Brody.[3] The Review Board affirmed.[4] In the *MO&O*, we concluded that HS should have received 30% integration credit rather than no integration credit. However, since this point was not decisionally significant, we affirmed the award of the permit to Brody.

3. In their pleadings, HS and Siebert argue that a recently decided case, *Weyburn Broadcasting Limited Partnership v. FCC*, 984 F. 2d 1220 (D.C. Cir. 1993), requires that the Commission reconsider whether further hearings are necessary on Brody's financial qualifications. They contend that, under *Weyburn*, Brody is required to have a "clear and workable financial plan" to justify a finding that she is financially qualified. They then argue that she fails to meet this standard because she estimated construction and operating expenses for the proposed station based on an oral conversation with her father (an experienced broadcaster), she did not account for her liabilities when she certified, and the evidence does not show that she considered legal expenses in calculating costs.

4. The Review Board fully considered arguments that Brody's reliance on her father for estimates and her financial liabilities require a hearing when it reviewed the ALJ's denial of HS' late-filed motion to add a financial qualifications issue against Brody. The Review Board found that, in addition to the fact that the motion was untimely, the parties' arguments were based on speculation.[5] The Commission affirmed the Board.[6] *Weyburn*, which is factually very different from this case, does not change that result,[7] and we therefore need not consider the question again here. *WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub nom., Lorain Journal Co. v. FCC*, 351 F. 2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). The argument that Brody did not include legal fees in estimating expenses is likewise based only on speculation and does nothing to further the premise that hearings on Brody's qualifications are required.[8]

5. HS separately makes the argument that, once the Commission found it was erroneous to deny HS all integration credit under *Royce International Broadcasting*, 5 FCC Rcd 7063 (1990) (subsequent history omitted),[9] it should have applied *Marlin Broadcasting of Central Florida, Inc. v. FCC*, 984 F. 2d 1220 (D.C. Cir. 1993), to award HS 100% integration credit rather than 30% integration credit. However, the argument that *Marlin* requires awarding HS 100% integration credit is also an argument that has been made previously and rejected.[10] In light of the 70% owner's undisputed de jure interest and her lack of managerial responsibility, HS' contention merits no further consideration. *WWIZ, Inc., supra*, 37 FCC 685.

6. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed on June 9, 1993, by HS Communications, Inc. IS DENIED.

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[1] Also before the Commission is a Consolidated Opposition to Petitions for Reconsideration filed June 22, 1993 by Stacy C. Brody and a Reply filed June 30, 1993 by HS.

[2] *Memorandum Opinion and Order*, FCC 91M-2253, released July 24, 1991.

[3] *Initial Decision*, 7 FCC Rcd 1309 (ALJ 1992).

[4] *Decision*, 7 FCC Rcd 6448 (Rev. Bd. 1992).

[5] 7 FCC Rcd at 6454 ¶ ¶ 18-23.

[6] 8 FCC Rcd at 3237 ¶ 2.

[7] *Weyburn* does involve some dispute concerning unsupported estimates, personal liabilities, and unanticipated legal fees. However, in that case the court determined that the ALJ erred in declining to conduct hearings on an applicant's financial qualifications because of a complex combination of circumstances clearly not present here. Among those circumstances, for example, were concerns about the facts that legal counsel had withdrawn for non-payment of fees, other bills were not paid and, where expenses had been met, questions existed about the source of the money. Further, stock was issued but not paid for and there were major discrepancies in testimony concerning the costs of prosecuting the application.

[8] In any event, we do not read *Weyburn* as overruling the line of cases establishing that total prosecution expenses need not be taken into account in determining an applicant's financial qualifications as long as the applicant pays such expenses on a current basis. *Weyburn, supra*, 984 F. 2d at 1229 n.1 , and there is no evidence that Brody failed to pay on that basis.

[9] *MO&O*, 8 FCC Rcd at 3237 ¶ 2 n.3.

[10] 7 FCC Rcd at 6452 ¶ 13; 8 FCC Rcd at 3237 ¶ 2.

7. IT IS FURTHER ORDERED that the Petition for Reconsideration filed on June 14, 1993 by Craig L. Siebert IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Daniel J. Sarunich — NAL/Acct. No: 215FE0083
Seattle, Washington

**ORDER**

**Adopted: November 29, 1993; Released: December 6, 1993**

1. Mr. Daniel J. Sarunich has requested reconsideration of a Forfeiture Order dated August 21, 1992. The forfeiture is cancelled.

2. Mr. Sarunich was charged with operation using voice communications on the Digital Selective Calling (DSC) frequency, Channel 70. See 47 C.F.R. §§ 80.207(a)(1), 80.359(a), & 80.373(f).

3. The Commission has reconsidered the usual forfeiture for the violation. Because there is no history of violation and consistent with the *1993 Policy Statement, Standards for Assessment of Forfeitures*, 8 FCC Rcd 6215 (1993), the forfeiture amount is reduced to zero.

4. Accordingly, IT IS ORDERED, pursuant to Section 1.80 of the Commission's rules, that the forfeiture assessed to Daniel J. Sarunich is CANCELLED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

VIACOM INC. File Nos. BTCCT-931029KS - KY

For Commission Consent to
Interim Transfer of Control of
Paramount Communications Inc.

**MEMORANDUM OPINION AND ORDER**

By the Commission:

**Adopted: November 23, 1993; Released: November 23, 1993**

1. Viacom Inc. (Viacom) seeks to acquire control by tender offer of Paramount Communications Inc. (Paramount), which holds Commission licenses for broadcast facilities. Paramount is also the subject of a competing tender offer by QVC Network, Inc. (QVC).[1] Viacom filed a supplemented short-form application, FCC Form 316, with a request that the Commission grant a special temporary authorization (STA) to a trustee to enable him to acquire and vote, subject to certain restrictions, the shares obtained via the tender offer and to exercise control of Paramount's licensed facilities, should Viacom prevail in the tender offer contest, during the interim period when Viacom's qualifications are under consideration. Viacom previously filed a long-form application, FCC Form 315.[2] QVC filed comments to Viacom's STA request, and Viacom responded.

**BACKGROUND**

2. Paramount is a publicly and widely traded company which, in addition to the businesses of producing motion picture and television programming, publishing books, and operating regional theme parks, holds Commission licenses for seven UHF television stations through its seven wholly owned subsidiaries. These are: WKBD, Channel 50 (Fox), Detroit, Michigan; KTXH, Channel 20 (Ind.), Houston, Texas; KRRT, Channel 35 (Fox), Kerrville, Texas; WDCA, Channel 20 (Ind.), Washington, D.C.; KTXA, Channel 21 (Ind.), Arlington, Texas; WTXF, Channel 29 (Fox), Philadelphia, Pennsylvania; WLFL, Channel 22 (Fox), Raleigh, North Carolina.[3]

3. Over the past several years and during the summer of 1993, according to the separate Schedule 14D-1 materials filed with the Securities and Exchange Commission by QVC and Viacom,[4] principals of both entities had each individually discussed with Paramount officials the possibility of various types of business combinations between Paramount and their own company. On September 21, 1993, pursuant to an agreement and plan of merger approved by their respective boards, Paramount and Viacom filed a long-form application for consent to a transfer of control of the licensees of parent company Paramount. In response, QVC announced, on October 21, 1993, its intention to launch a tender offer for Paramount shares, formally commencing that offer on October 27, 1993. Unless extended, the QVC offer expires at midnight on December 1, 1993.[5] In the meantime, Viacom and Paramount amended their original agreement so as to accomplish their merger via tender offer. The Viacom tender offer commenced on October 25, 1993 and expires, unless extended, at midnight on November 24, 1993. Viacom now seeks, on its supplemented short-form application, a STA for its designated trustee so that he may manage and operate the Paramount licensees pending review of the long form application.[6]

4. Section 310(d) of the Communications Act mandates that Commission consent be obtained prior to a transfer of control of licensed stations. Viacom here invokes the Commission's two-step procedure for granting such control so as to expedite its competing tender offer. The procedure,

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[1] In an Order adopted today, the Commission also grants an STA to the trustee designated by QVC so that QVC, in the event it is the prevailing bidder, may have a mechanism in place to acquire Paramount shares pending Commission action on its long-form application. Accordingly, QVC's comments in favor of, and Viacom's argument against, simultaneous Commission grant of the two STA requests are rendered moot.

[2] FCC File Nos. BTCCT-930921KG through KM.

[3] Through its wholly owned Paramount Pictures Corporation (PPC), Paramount holds a 6.4565 percent, attributable interest in Combined Broadcasting, Inc. (Combined), licensee of television stations WGBS-TV, Philadelphia, Pennsylvania, WBFS-TV, Miami, Florida, and WGBO-TV, Joliet, Illinois. PPC's interest in Combined derived from its role as a creditor in a Chapter 11 reorganization. *See Paramount Communications, Inc.*, 7 F.C.C. Rcd 1390 (1992). Now pending before the Commission is an application, BTCCT-930818KE, seeking consent to the transfer of control of the licensee of WGBS-TV, Philadelphia, to FTS Philadelphia, Inc.

[4] The Securities and Exchange Commission rules require that a party making a tender offer for a publicly traded company file a Schedule 14D-1 with that agency. In addition to terms of the offer and information about the bidder and target company, the Schedule 14D-1 must include information regarding past contacts, transactions or negotiations with the target company, as well as identify the source and amount of funds to be utilized in financing the tender offer. *See* 17 C.F.R. §240.14d-100.

[5] The initial QVC tender offer was set to expire on November 24, 1993, but QVC's subsequent action increasing its offer price extended that date to to November 26, 1993. However, as a result of litigation pending in the Delaware Chancery court, both QVC and Viacom agreed to extend their respective deadlines, QVC to December 1, 1993 and Viacom to November 24, 1993.

[6] Also publicly traded, Viacom holds Commission licenses for five television and 14 radio stations, either directly or through wholly owned subsidiaries. In addition, Viacom and its subsidiary Viacom International Inc. are parent companies of various cable television companies operating in California, Washington, Oregon, Ohio and Tennessee. Viacom also operates, through its wholly owned subsidiaries, cable television networks. Approximately 76 percent of Viacom stock is owned by National Amusements, Inc., the majority of whose voting stock is controlled by Sumner M. Redstone in his capacity as trustee of the Sumner M. Redstone Trust.

detailed in *Tender Offers and Proxy Contests (Tender Offers)*, 59 R.R. 2d 1536 (1986), *appeal dismissed sub nom. Office of Communication of the United Church of Christ v. FCC*, 826 F.2d 101 (D.C. Cir. 1987), and utilized in past tender offers involving target communications corporations, *see, e.g., CNCA Acquisition Corp.*, 3 F.C.C. Rcd 6088 (1988); *JB Acquisition Corp. (JB Acquisition II)*, 60 R.R. 2d 1207 (1986); *Macfadden Acquisition Corp. (Macfadden II)*, 60 R.R. 2d 1066 (1986),[7] entails accelerated action in the first step, the bidder's short form application which seeks grant of an STA to an independent trustee. In acting upon a STA request, the Commission defers examination of the bidder's qualifications to be a licensee until the long-form application review, confining its consideration at the first step to the trust instrument, the trustee's legal qualifications, and, if challenged, the bidder's ability to finance the tender offer. *See, e.g., Macfadden Acquisition Corp. (Macfadden I)*, 104 F.C.C. 2d 545, 565-66 (1986). The STA would empower the trustee to collect and purchase tendered shares and to operate the corporation, subject to certain limitations.[8] Upon consummation of the tender offer, when the tendered shares are purchased, the Commission, in the second step, reviews the long-form application to determine whether the bidder is qualified to be a Commission licensee.[9] Pending our action in this second step, however, the bidder is proscribed from exercising control of the tendered stock and from attempting to influence the actions of the trustee. Only upon grant of the long-form application, therefore, may the bidder assume control of the licensee. If the Commission finds the bidder unqualified to be a Commission licensee and denies the long-form application, the trustee alone must dispose of the target company's stock, setting the terms and consideration for that stock.

## VIACOM TRUST PROPOSAL

5. *The trust instrument.* Viacom seeks to acquire control of, and the entire equity interest in, Paramount through a two-tiered offer to Paramount shareholders: first, an all-cash tender offer for, and purchase of, 51 percent of Paramount stock at $85 per share, followed by the second-step merger, the conversion of the remaining 49 percent of Paramount stock issued and outstanding into the right to receive Viacom stock.[10] The cash portion of the tender offer totals approximately $5.19 billion. All shares acquired by Viacom in its tender offer, or by any other means,[11] will be simultaneously transferred and delivered to the trustee, according to the terms of a voting trust agreement executed by Viacom and its designated trustee, Glen O. Robinson. During Commission review of Viacom's long-form application, the trustee will hold the legal title and all voting rights to any Viacom-held shares, while Viacom will own the equitable interest in those shares, entitling it to receive dividends and other distributions other than Paramount voting securities. However, the trustee must exercise his votes in a manner so as to facilitate Viacom's tender offer, to oppose any proposals in conflict with consummation of the tender offer, and to maintain the current management and operations of Paramount. With regard to the last duty, the trustee may elect or appoint, including himself, no more than two of the 14 directors on the Paramount board, unless the removal and replacement of a director is necessitated by a director's "opposing, impeding or impairing" the effectuation of Viacom's tender offer or wasting of corporate assets. A replacement director, according to the trust, must bear a relationship to Viacom as strict as that of the trustee to Viacom, that is, having no business or familial connections with Viacom or any of its officers, employees, directors, shareholders or affiliates. Communications permitted between trustee-appointed directors and Viacom, under the trust provisions, also parallel those allowed between the trustee and Viacom: one-way written communications to Viacom concerning the management and operations of Paramount and two-way communications, to and from Viacom, concerning the mechanics of implementing the tender offer.

6. The rights and duties of the trustee, who is to be compensated by Viacom for his services, terminate upon his incapacity, death or insolvency. If such circumstances occur, or the trustee resigns by giving Viacom 60 days' advance written notice, he will be succeeded, subject to prior Commission approval, by a successor trustee chosen by Viacom. Further, the voting trust agreement, expressly irrevocable pending Commission review of Viacom's long-form application, will terminate upon the first to occur of the following: (1) 10 years from the execution of the trust agreement; (2) the transfer of shares to Viacom subsequent to Commission approval; (3) Viacom's withdrawal of its applications; (4) Viacom's withdrawal of its STA request prior to Commission action on that request; or (5) the sale of all stock or assets to a third party. As to the sale of stock, the trust agreement provides that in the event Viacom notifies the trustee in writing during the pendency of the applications of its desire to sell the acquired shares or assets and the trustee "fails to disapprove such decision to sell," the trustee must sell the Paramount shares "in such a manner as will maximize the proceeds" to Viacom. In this voluntary sale, although the trustee selects the purchasing party or parties and defines the terms of such sale,

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[7] The two-step procedure was employed prior to Commission adoption of *Tender Offers*, in *L.P. Media, Inc.*, 102 F.C.C. 2d 1276 (1985), and in *One Two Corp.*, 58 R.R. 2d 924 (1985).

[8] The Commission is empowered under Section 309(f) of the Act to authorize STAs in cases where there are "extraordinary circumstances" requiring temporary operations in the public interest. We have concluded that cases involving tender offers of a communications corporation, such as are involved here, warrant such Commission action. *Tender Offers*, 59 R.R. 2d at 1568-78.

[9] This second step is governed by the formal procedures specified in Section 309(d) of the Act.

[10] Each remaining share of Paramount stock will be converted into the right to receive 0.20 shares of Class A common stock, 1.08 shares of Class B common stock, and 0.30 shares of a new series of cumulative convertible exchangeable preferred stock. Viacom's original tender offer price was $80 per share for 51% of the shares, with the remaining shares to be converted to a nearly identical package of Viacom stock, except for the convertible preferred stock, which was to be for 0.20, instead of 0.30, shares of that class.

[11] According to the Schedule 14D-1 filed with the Securities and Exchange Commission in connection with the tender offer, Viacom, National Amusements Inc., and Sumner M. Redstone, the bidders in the tender offer, currently own no Paramount stock. However, Paramount has granted Viacom the option to purchase up to 23,699,000 shares of previously unissued shares of Paramount common stock, or 16.7 percent of that class of stock, exercisable upon certain events.

Viacom may withdraw its request to sell at any time prior to consummation of the sale, "subject to the independent concurrence of the Trustee with such withdrawal." Conversely, if the sale is involuntary, meaning the Commission has denied a transfer of control of the Paramount stock to Viacom or a court has ordered a sale of the stock, the trustee, according to the trust agreement, retains discretion to select the sale terms, with the continued obligation of maximizing the proceeds, but Viacom has no authority to interpose a veto to that sale. Finally, the agreement provides that the trust instrument cannot be amended, altered or modified except in writing and signed by both Viacom and the trustee. Substantial changes are to be made "only as required or approved by FCC order" and a copy of any insubstantial change is to be filed with the Commission within 10 days after such changes are executed.

7. No provision of the Viacom trust instrument has been challenged. After reviewing the agreement, we conclude that its terms are in compliance with Commission policy governing trusts in tender offer cases.[12]

8. *The trustee.* Glen O. Robinson, a United States citizen and former member of the Commission, is currently a professor at the University of Virginia Law School. He has no direct or indirect familial or business relationship with Viacom or any of its subsidiaries or affiliates, including Blockbuster Entertainment Corporation, which has purchased, for $600 million, 24 million shares of Series A cumulative convertible preferred stock in Viacom.[13] However, Robinson owns seven shares of NYNEX Corporation, a regional Bell telephone company which has entered into an agreement to purchase $1.2 billion of Viacom Series B cumulative convertible preferred stock, entitling NYNEX to designate one director to sit on the Viacom board. One of the primary objectives of our tender offer policy is to assure the independence of the trustee. *Tender Offers*, 59 R.R. 2d at 1579. Here, Robinson holds stock, albeit a nonattributable amount, in a company with a positional and financial interest in Viacom, a bidder for control of Paramount. Such a link, though arguably attenuated, is not compatible with the trustee's strict insulation from the bidder which is sought by our tender offer policies. We do not question the integrity of trustee-designate Robinson, NYNEX, or Viacom, only the influence, albeit slight, that attaches to such connections. Indeed, Viacom and Robinson represent in Exhibit 6 of the Form 316 application and STA request that prior to assuming his duties as trustee, Robinson will divest the NYNEX stock. To assure that Robinson is free of all influence from any person or entity affiliated with Viacom, we shall condition our grant of the STA on Robinson's divestiture of all stock in a company with any financial interest in Viacom. Finally, according to the STA request, Robinson has no positional or ownership interest in any broadcast station, rendering him in compliance with the Commission's multiple ownership rules and policies. Nor has he been the subject of any adverse finding by any court or administrative body with respect to any felony, serious misdemeanor, mass media-related antitrust or unfair competition, fraudulent statements to another governmental unit, or discrimination. No party has assailed the qualifications of Robinson and we find him qualified to serve as trustee of Paramount on behalf of Viacom.

## VIACOM'S FINANCIAL QUALIFICATIONS

9. QVC, in comments submitted in connection with Viacom's request for STA, questions a portion of Viacom's financial arrangements. Although QVC indicates that it is not formally opposing Viacom in this proceeding, we believe that any allegations regarding Viacom's ability to finance a tender offer must be resolved. It is Commission policy in tender offer cases to defer consideration of the bidder's qualifications until the long-form application phase of the procedure. *See, e.g., Macfadden II*, 60 R.R. 2d at 880; *Macfadden Acquisition Corp.* (*Macfadden I*), 104 F.C.C. 2d 545, 565-66 (1986); *L.P. Media, Inc.*, 102 F.C.C. 2d 1276, 1286 (1985). However, because the financing needed to consummate the acquisition of the target corporation is to be arranged by the bidder, and not the trustee, it is relevant to our public interest finding in granting temporary control to a trustee that the ultimate proposed transferee be financially qualified. *Macfadden I*, 104 F.C.C. 2d at 565-66.

10. All proposed transferees, before their applications can be granted, must certify sufficient capital to consummate the transaction at the closing and to meet expenses for three months. *Financial Qualifications Standard*, 87 F.C.C. 2d 200 (1981). However, when the application contains financial information, as does Viacom's, because of the Securities and Exchange Commission-required tender offer materials submitted in this proceeding, we must also review the portions of that financial record that are challenged. *Macfadden II*, 60 R.R. 2d at 881. Here, Viacom made the required financial certification on its long-form application that it has available the funds required to consummate the tender offer, now totaling approximately $5.19 billion. But QVC contends that Viacom's reliance on the $1.2 billion of equity investment by NYNEX, a portion of the total funds committed, is merely conditional. The NYNEX investment, according to Viacom's Schedule 14D-1, is conditioned upon "the operations of [Viacom] and its

[12] Section 2(c) of the trust agreement provides that in order to secure loans utilized in connection with the tender offer, the trustee "[a]t the written direction" of Viacom "shall grant" a security interest to secure loans "to the extent the proceeds of such loans are used directly or indirectly in connection with the acquisition of [Paramount] Shares. . . ." We interpret the ability of the bidder to direct the hypothecation of Paramount stock to be limited to the sole purpose of financing the tender offer. To that end, therefore, this provision falls within the ambit of our policy regarding trustees in tender offer cases, that the trustee facilitate, by taking all actions necessary, the consummation of the bidder's tender offer. *Tender Offers*, 59 R.R. 2d at 1583. In addition, we find Section 2(c) of Viacom's trust instrument permissible because it expressly provides for the inclusion of three conditions in any security agreement involving a pledge of the Paramount stock. Those conditions, which we require in all pledges of stock, *see Minority Ownership*, 99 F.C.C. 2d 1249, 1254 (1985), are: (1) the voting rights for any pledged stock will remain with the trustee, even in the event of default on the loans by Viacom; (2) in the event of a default, there will be a public or private sale of the stock; and (3) prior to the exercise of stockholder rights by a purchaser at such sale, the prior consent of the Commission will be obtained.

[13] This stock purchase, according to an amendment to Viacom's long-form application, carries no voting rights, but entitles Blockbuster to designate one representative to the Viacom board.

subsidiaries being in conformity with certain regulatory requirements applicable to companies in which NYNEX Corporation holds investments. . . ." And, QVC argues, Viacom itself, in its Schedule 14D-1, stated that "[n]o assurances can be given that [Viacom] and its subsidiaries will be in conformity with such regulatory requirements at the time [Paramount] Shares are accepted for payment pursuant to the Offer." Under "normal" circumstances, QVC maintains, the Commission would require the applicant to have reasonable assurance that NYNEX had demonstrated that $1.2 billion in funds were available for this investment and that the conditions to funding by NYNEX could be satisfied.

11. An applicant may establish that it has "reasonable assurance" of committed funding by providing the Commission with a letter it has received from a lender, signed by an official of that lender, and indicating the lender's willingness to furnish the applicant a specific amount of funds toward the proposed transaction. *Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117, 1120 (D.C. Cir. 1978). In this case, we note that in addition to the statements cited by QVC, Viacom also represented in its Schedule 14D-1 that in the event the issuance of sale of stock to NYNEX is not consummated prior to the time Paramount shares are accepted for payment pursuant to the tender offer, the NYNEX amount will be funded by increasing Viacom's borrowings under bank credit facilities or other sources. Indeed, Viacom has received commitments that such funds will be earmarked to cover the NYNEX amount. In Amendment No. 3 to its Schedule 14D-1, Viacom submitted a copy of a letter dated November 3, 1993 and signed by the five lead lending institutions in Viacom's credit facility: The Bank of New York, Citibank, N.A., Citicorp Securities, Inc., Morgan Guaranty Trust Company of New York, and J.P. Morgan Securities Inc. This letter indicated that the institutions' earlier commitment to lend money for the original Viacom-Paramount merger was now amended to encompass Viacom's merger with Paramount via tender offer, including a bridge loan to finance a substantial part of the NYNEX amount. It is true, as QVC claims, that one of the conditions of the term loan is that Viacom certify that it has no reason to believe that the regulatory steps required by NYNEX "are not capable of being completed on or before February 28, 1994. . . ." Such conditions are not fatal to the reasonable assurance the Commission requires. Rather, Viacom's lenders have "gone as far as [they] could under the circumstances" in providing reasonable assurance that the investments would be made "short of making a legally binding" commitment. *Id.* Indeed, pursuant to that commitment, on November 19, 1993, according to Amendment No. 7 to its Schedule 14D-1, Viacom completed the issuance and sale to NYNEX of 24 million shares of Series B cumulative convertible preferred stock for an aggregate purchase price of $1.2 billion. Accordingly, we find that Viacom has demonstrated that it has reasonable assurance that the term loan will be available. As for the remaining portions of Viacom's financing arrangements, QVC has not questioned their availability and we therefore find Viacom's certification sufficient to demonstrate reasonable assurance that it has financing sufficient to consummate the tender offer.[14]

## CONCLUSION

12. We have reviewed the proposal, the comments, and the reply and conclude that grant of Viacom's request for a STA would serve the public interest, convenience and necessity.

13. Accordingly, IT IS ORDERED, That the comments filed by QVC ARE DISMISSED.

14. IT IS FURTHER ORDERED, That the request for special temporary authorization IS GRANTED to Glen O. Robinson, trustee, for 180 days from the release date of this decision, to solicit, collect and acquire the stock of Paramount Communications Inc., subject to the representations set forth in its applications and pleadings, the conditions set forth in the trust instrument, except as limited by this decision or the following conditions, which take effect upon the release of this Order, unless otherwise specified:

1. Viacom Inc., its subsidiaries, and the officers and directors of those corporations (collectively referred to below as Viacom interests), while the trust is in effect, will not nominate a member of the board of directors of Paramount or its subsidiaries as their representative or influence the trustee's selection of directors. Any persons nominated by the trustee, and elected, for the board of Paramount shall be subject to the same restrictions and conditions applicable to the trustee, and will have no familial ties or business relationships with the Viacom interests.

2. The Viacom interests will not involve themselves, directly or indirectly, in the operation or management of Paramount, or seek to influence the operation or management of Paramount.

3. Any communications from the trustee to the Viacom interests relating to the tender and purchase of shares from the present stockholders or to the maintenance and operation of Paramount must be in writing. No communications shall be made by the Viacom interests to the trustee, orally or in writing, relating to the management or operation of the corporation. Communications from the Viacom interests to the trustee in connection with the tender and purchase of shares must be in writing.

4. The trustee will maintain the status quo, as defined in *Tender Offers*, 59 R.R. 2d 1536 (1986). This directive requires that the trustee act so as to maintain the present management and operations of the corporation. The trustee will have the discretion to oppose only actions inconsistent with the preservation of corporate assets or actions that would be inconsistent with the transfer of control, if approved, to the Viacom interests.

[14] As noted in Notes 5 and 10, *supra*, Viacom increased its tender offer price, thereby raising the total cash price from approximately $4.83 billion to $5.19 billion. In Amendment No. 6 to its Schedule 14D-1, dated November 13, 1993, Viacom amended its tender offer to waive the financial condition based upon its receipt of revised commitments from the five lead lenders and 19 other lenders, thereby increasing the bank facility to $4.8 billion. This amount, in conjunction with the $600 million Blockbuster investment, appears sufficient to cover Viacom's revised tender offer price.

5. Viacom may direct the trustee to pledge the acquired stock only for purposes of securing a loan whose proceeds will be utilized in consummating the tender offer, provided that any security agreement entered into by the trustee includes the following provisions: (1) the voting rights for any pledged stock remains with the trustee, even in the event of a default by Viacom on the loans; (2) in the event of a default, there will be a public or private sale of the stock; and (3) prior to the exercise of shareholder rights by the purchaser at such sale, the prior consent of the Commission is obtained.

6. Trustee-designate Glen O. Robinson will divest all stock held in NYNEX Corporation and in any other entity with a financial interest in Viacom prior to consummation of the tender offer.

7. There will be no substantial changes in the trust instrument, except as may be necessary to comply with this Order, or as may be approved in advance by the Commission. Any insubstantial changes in that instrument must be filed promptly, within 10 days of the date of execution, with the Commission, with a copy to the Chief, Video Services Division.

8. In the event that the application to transfer control to Viacom is not approved, the trustee will notify the Commission promptly, within 30 days after a final determination by the Commission, after a court-ordered sale, or after Viacom and the trustee jointly determine that such a transfer will not be pursued, with regard to the trustee's plans for disposing of the stock in the shortest period possible.

9. Any request for an extension of this authorization, if needed, will be filed at least 30 days in advance of the expiration date.

10. Any law firm or firms the trustee consults shall represent no clients with involvement in, or connection with, the Viacom interests.

15. The Mass Media Bureau will send copies of this Memorandum Opinion and Order to the parties to this proceeding by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 92-266**

In the Matter of

Implementation of Sections of
the Cable Television Consumer
Protection and Competition
Act of 1992 Rate Regulation

**THIRD REPORT AND ORDER**

**Adopted: November 23, 1993; Released: November 24, 1993**

By the Commission:

## I. INTRODUCTION

1. By this *Third Report and Order* (*"Third R&O"*) we amend Section 76.922(b) of the Commission's Rules to require cable operators facing regulation of both the basic and cable programming services tiers to select the same method of initial rate regulation for both tiers.[1] Specifically, the *Third R&0* will require that if an operator subject to rate regulation for the first time selects the benchmark rate-setting approach for one tier, the operator must also adopt the benchmark approach for all other tiers that become subject to regulation in the same year.[2] Similarly, if an operator chooses to justify rates for one regulated tier based upon a cost-of-service showing, the operator must also seek a cost-of-service determination on all other regulated tiers that same year. This requirement of applying a consistent rate evaluation approach across tiers is taken as a precautionary measure to prevent operators from engaging in retiering and cost-shifting strategies during the initial rate-setting process that would undermine the tier neutral rate-setting principles underlying the benchmark regulatory framework.[3]

## II. BACKGROUND

2. In the *Rate Order*, we established a benchmark and price cap approach as the primary method for setting the rates of regulated cable services.[4] We based our adoption of this regulatory regime on an evaluation of its advantages over traditional cost-of-service regulation. Under the benchmark approach, existing rates for cable service are compared to a benchmark that reflects the rates charged by cable systems that are subject to effective competition, with a given number of subscribers, regulated channels, and satellite-delivered signals. Once initial rates are determined by comparison to the benchmark, rates are governed on a going-forward basis by a price cap mechanism. The price cap permits annual adjustments for inflation and a recovery of increases in external costs, including programming costs, costs of franchise requirements, taxes, and franchise fees. As a "backstop" to the benchmark/price cap approach, we established an opportunity for cable operators to justify rates above benchmark or capped levels based on costs. In this regard, we recently sought comment on adoption of uniform cost-of-service standards for application to this alternative method of rate determination.[5]

3. The Commission also determined in the *Rate Order* that the regulatory framework for rate regulation based on the benchmark approach should be "tier neutral." In other words, we stated that we would apply the same substantive standard for calculating reasonable rates for both the basic and cable programming services tiers. The practical outcome of this approach is that it achieves a permitted charge per channel that, prior to adjustments for inflation and external costs, is the same for all tiers of regulated service. We found this approach to be preferable to one that would, for example, suppress rates for the basic service tier and allow higher earnings for cable programming services tiers. In this regard, we determined that the potential benefits of a low-priced basic tier were outweighed by the fact that such an approach would create incentives for cable operators to move programming to higher tiers where they would charge higher rates to the detriment of subscribers. We also indicated that different rate standards for the basic and cable programming services tiers could significantly increase the complexity of rate regulation.[6]

4. In the *Rate Order*, we did not specify whether a cable operator is permitted to choose the cost-of-service approach for one tier and the benchmark approach for another regulated tier, or whether parallel treatment for both tiers is required in setting initial rates. Several parties identified this as a problem on reconsideration of our *Rate Order* and we issued a *Third Further Notice of Proposed Rulemaking*

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[1] *See* Appendix A for rule amendments.

[2] Thus, an operator that becomes subject to basic rate regulation on December 1, 1993 and selects the benchmark rate-setting approach must also choose the benchmark approach if the operator becomes subject to regulation of its non-basic tiers at any time up until December 1, 1994. Upon expiration of this one year time frame after initial rates have been set, the operator can adopt different rate determination methods for its service tiers.

[3] In order to avoid the application of inconsistent rate-setting methods by operators during this early phase of rate regulation when initial permitted per channel charges are being established, we find the need to make the rule changes adopted herein operative immediately. Accordingly, we find good cause for making our amendments to Section 76.922 (b) effective upon publication in the Federal Register. 5 U.S.C. Section 553(d)(3).

[4] *See Report and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 (1993) (*"Rate Order"*).

[5] *See Notice of Proposed Rulemaking* in MM Docket No. 93-215, FCC 93-353 (released July 16, 1993), 58 FR 40762 (July 30, 1993) (*"Cost-of-Service Notice"*).

[6] The benchmark formula is based on prices that are averaged across all tiers of regulated services. We indicated in the *Rate Order* that a "tier neutral" per channel rate calculated as an average of charges across all tiers and compared to the benchmark is simpler for cable operators and regulators to administer

(*"Third Further NPRM"*) seeking comment on the matter.[7] Specifically, we requested comment on whether cable operators should be permitted to choose the cost-of-service approach for one regulated tier of cable service and the benchmark approach for another regulated cable service tier, or whether consistent treatment for both tiers is required in setting initial rates. We tentatively concluded that cable operators should be required to elect the same regulatory approach for all regulated tiers. Thus, if a system became subject to regulation at the local level, and sought to justify its basic service rates using the benchmark system, the reasonableness of its cable programming services rates would also be based on the benchmark, if the Commission were considering a complaint filed against those rates. In reaching this tentative conclusion, we sought to prevent cable operators from moving more expensive programming services from the benchmark-regulated tier to the tier regulated by a cost-of-service showing and ultimately recovering more than compensatory rates. We tentatively concluded that this was the best way to preserve the tier neutral approach to rate setting adopted in the *Rate Order*.[8]

5. We also requested comment on what procedural requirements, if any, we should adopt to provide for coordination between local franchising authorities and the Commission in the event that a cable operator chooses to make concurrent cost-of-service showings before each jurisdiction. We inquired as to whether we should require that the determination of one jurisdiction will govern, or be given considerable weight in setting rates for the tier subject to the oversight of the other jurisdiction. We solicited comment on whether cable operators should be allowed to switch from benchmarking to cost-of-service and *vice-versa*. We also questioned whether we should impose a specific timetable for any sort of "switching" activity that is allowed.[9]

## III. COMMENTS

6. In response to the *Third Further NPRM*, cable operator commenters uniformly oppose enforcement of a consistent rate approach for all regulated tiers.[10] They make four primary arguments in support of their position. First, they argue that allowing operators to choose between the different rate-setting methods for the different tiers does not promote "gaming" because the Commission can consider overall costs and rates for all regulated services in setting rates for the cable programming services tier. Second, they contend that the Commission's price cap rules provide a disincentive to shift costs between tiers. Third, they argue that consistent rate treatment abandons the Cable Act's dichotomy between local and federal regulation of the different tiers. Fourth, they believe that requiring a consistent rate-setting approach will promote more cost-of-service showings for the tiers for which the cable operator would otherwise have adopted the benchmark approach.[11]

7. Holding the opposite view on this issue, municipalities and one telephone company support enforcement of a consistent rate-setting methodology. These commenters argue that such a requirement will reduce hidden costs passed on to subscribers due to "gaming"; lead to fewer cost-of-service proceedings, which will only be initiated if the benchmarks overall are inadequate; and promote the same initial permitted per-channel rates on each tier.[12]

8. Commenters' suggestions on procedural requirements were varied in nature. These suggestions include: 1) consolidating all cost-of-service hearings at the Commission; 2) requiring the sharing of cost-of-service data between the franchising authorities and the Commission; 3) allowing either the local franchising authority or the Commission to use the other jurisdiction's rate determination as binding or informative; and 4) requiring notification to all other local jurisdictions in which the same company has initiated a cost-of-service proceeding for the purpose of consolidation.[13] The commenters generally advocate imposing some type of time limitation on a consistent rate structure requirement, suggesting that cable operators should be able to switch from one rate-setting method to another after a period of six months,[14] one year,[15] or whenever there is a reasonable basis for doing so.[16]

## IV. DECISION

9. After carefully considering the record before us, we affirm our tentative conclusion that cable operators facing regulation of the basic and cable programming services tiers should be required to select the same method of initial rate-setting for both tiers. Thus, if a cable operator's basic service tier becomes subject to regulation at the local level (or in some instances, at the federal level), and the cable operator selects the benchmark approach, it must also adopt the benchmark approach if its cable programming services tier becomes subject to a complaint at the Commission within the same year. Similarly, if the cable operator chooses to make a cost-of-service showing in response to regulation of the basic service tier, then the

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and would discourage the shifting of programming services away from the basic services tier. *Rate Order*, 8 FCC Rcd at 5759-60 and n.501.

[7] *See Third Further Notice* in MM Docket No. 92-266, FCC 93-428 (released Aug. 27, 1993), 58 FR 46737 (Sept. 2, 1993).

[8] *Id.* at paras. 146-152. *See also Rate Order*, 8 FCC Rcd at 5759.

[9] *Third Further NPRM* at paras. 146-52.

[10] *See* Appendix B for a complete list of commenting parties.

[11] *See, e.g.*, Comments of Cablevision Industries Corp., *et. al* ("Joint Parties") at 11-14; National Cable Television Association ("NCTA") at 15-17; Tele-Communications, Inc. ("TCI") at 4-9; Continental Cablevision ("Continental") at 2-5; Media General Cable of Fairfax County, Inc. ("Media General") at 2-3; Time Warner Entertainment Co., L.P. ("Time Warner"); Falcon Cable TV, *et. al* ("Falcon") at 14-17; Cable Operators and Associations ("Cable Operators") at 6. *See also* Reply Comments of Continental at 11-12; Joint Parties at 10-12; Time Warner at 6-7.

[12] *See, e.g.*, Comments of Municipal Franchising Authorities ("MFA") at 3-7; Austin, Texas, *et. al* ("Coalition") at 9-13; National Association of Telecommunications Officers and Advisors, *et. al* ("NATOA") at 11-12; New York State Commission on Cable Television ("New York") at 5-7; GTE Service Corp. ("GTE") at 10-11. *See also* Reply Comments of Coalition at 15-18; GTE at 7-10.

[13] *See e.g.*, Comments of MFA at 7-8; Massachusetts Community Antenna Television Commission ("MCATC") at 8; NATOA at 12-14. *See also* Reply Comments of Joint Parties at 13-14; KBLCOM, *et. al*, at 1-3; Viacom International, Inc. at 9-11.

[14] Comments of Falcon at 18.

[15] *See* Comments of NATOA at 11 n.6.

[16] *See, e.g.*, Comments of Coalition at 11-12; Time Warner at 10.

operator must also make a cost-of-service showing in response to a cable programming services complaint filed within that year. On balance, we believe this approach is a necessary part of the tier neutral and rate averaging principles built into the benchmark system, particularly because it eliminates the incentive for cable operators to shift costs among tiers to the detriment of consumers.

10. Requiring operators to select the same rate determination method for all regulated tiers when initial rates are being set is necessary because it bolsters our ability to ensure that subscribers to all regulated tiers of service pay reasonable rates. Asymmetric treatment of the two tiers would hamper the ability of both local franchising authorities and the Commission to apply the benchmark's permitted per channel rate in a consistent manner across tiers. In particular, operators able to choose a different rate-setting approach for each of its cable services tiers could selectively apply the benchmark in a manner that would enable the operator to charge higher overall rates than would be allowed if either the benchmark or the cost-of-service approach had been applied consistently across all program tiers. Specifically, an operator could retier its services and place its most expensive programming on the tier regulated by a cost-of-service determination. The operator would then be allowed to charge a per channel rate for the low cost tier based on the benchmark (which is an averaged rate) that actually far exceeds its costs for that tier (and, thus, the rate it would be able to charge under a cost-of-service showing). At the same time, the operator may be able to charge a higher-than-benchmark rate for the other service tier through a cost-of-service showing, based on its higher costs for that tier. The end result would be rates that exceed the reasonableness standard set forth in the 1992 Cable Act.[17] Thus, we conclude that a requirement that operators apply consistent rate-setting approaches across tiers is needed to uphold the concept of tier neutrality and prevent cost-shifting, thereby making the process of setting initial benchmark rates work effectively and as intended.[18] We will, however, review this policy after 18 months to determine whether it is necessary and appropriate to serve the purposes for which we are adopting it.

11. Additionally, we note that we are restricting our requirement that operators must use the same rate-setting method to one year from the date that the operator first becomes subject to regulation at either the local or federal level. Thus, after the expiration of its first year of initial rate regulation on a service tier, an operator is free to adopt different rate determination methods for its other service tiers. We take this approach for two reasons. First, we have given operators the ability to use either of two rate-setting methodologies on the possibility that there may be some systems for which benchmark rates may not provide adequate recompense because of that system's particular cost structure. Any system's cost structure may vary substantially over time, however, so that a rate-setting methodology that is appropriate at the initial date of regulation for both tiers of service may not be appropriate much later for both tiers of service. Moreover, after the initial rates have been set for a tier, those rates will change over time, pursuant to the going forward rules governing rate increases. As this occurs, our concern for tier neutrality in rates and rate-setting will likely not be as acute as in this period of transition to regulation. We recognize that over time, the cost structure of cable services from tier to tier may legitimately evolve to the point where consistent rate treatment across tiers might be overly restrictive. Accordingly, we have decided to grant cable operators the flexibility to use different rate-setting methods across tiers after the passage of one year of initial rate regulation so that bona fide structural and operational changes may be made as rate-making proceeds.

12. We take this opportunity to respond to the specific arguments that cable operators have made in support of differential treatment of basic and cable programming tiers. The first is that a tier-neutral approach is not necessary to achieve the goals of rate regulation. Specifically, cable commenters contend that as long as regulators are entitled to consider a cable system's overall costs and rates for all regulated services, then operators will be unable to shift costs from tier to tier.[19] One commenter suggests that the Commission should require any operator who elects cost-of-service treatment of the non-basic tier to demonstrate that its overall return for both basic and cable programming services is reasonable.[20]

13. We acknowledge that, in reviewing the cost-of-service showings made by operators for cable services, regulators will need to examine how costs are allocated among the regulated tiers. We have adopted and are in the process of developing additional cost allocation rules that will help to accomplish this goal.[21] However, even with cost allocation rules in place, the Commission, in evaluating a cost-of-service showing for non-basic service, cannot call into question the rates charged for basic service without undermining the Cable Act's shared jurisdictional scheme. Basic tier rates generally are regulated by local franchising authorities. Therefore, in most instances, even where we uncover unreasonable cost-shifting, we could not compel the operators to justify their rates across all tiers and adjust them accordingly.[22]

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[17] Indeed, in the *First Order On Reconsideration*, we stated that one reason for the adoption of tier neutrality was to eliminate any incentive for operators to move services to other tiers where they could charge relatively higher prices without necessarily corresponding higher costs. *See First Order on Reconsideration* in MM Docket No. 92-266, FCC 93-428 (released August 27, 1993) at para. 31. *See also Rate Order* at para. 196.

[18] We have adopted similar safeguards to address concerns of cost-shifting in other regulatory contexts. *See, e.g., Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786, 6819 (para. 271) 1990, *recon.*, 6 FCC Rcd 2537 (1991), *aff'd sub nom. National Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993) (Commission adopted "all-or-nothing" rule to eliminate incentive for local exchange carriers to shift costs from affiliates subject to price cap regulation to rate of return affiliates).

[19] Joint Parties Comments at 12; Continental Cablevision Comments at 4; Media General Comments at 3.

[20] Continental Cablevision Comments at 4.

[21] *See Cost-of-Service Notice supra* at note 5.

[22] If we required operators electing cost-of-service for the upper tier and benchmark for the lower tier to justify their overall return for both basic and cable programming services, as Continental Cablevision suggests, we would effectively be imposing a cost-of-service showing for both services. Not only would this be undermining the jurisdiction of the local franchising authority to regulate rates, but it would also be second-guessing the authority's benchmark analysis. The Cable Act vests in

14. The second argument made by cable commenters has to do with the creation of rules that remove incentives for cost-shifting. Specifically, cable commenters argue that they have no incentive to manipulate the rate process under the Commission's price cap regime. Specifically, they allege that since operators can pass through programming costs directly to subscribers as external to the benchmark rates, they can effectively recover such costs without having to shift them disproportionately to the tier regulated by cost-of-service.[23] They also observe that if an operator attempts to lower its programming costs on the basic tier, the Commission's external price cap adjustment rules require the operator to decrease the price of its basic service to reflect the reduction in costs.[24] Thus, operators believe it is not possible for them to manipulate costs between tiers under price cap rate regulation.

15. These arguments address the ability of operators potentially to manipulate the rate process in the context of our future price cap regime, but they do not address the probability that operators might engage in such practices now, while initial rates are being set. We believe that a tier-neutral approach is important to diminish any incentive or opportunity for operators to manipulate the initial rate-setting process to warrant the adoption of a requirement of consistent rate approaches as a solution to the problem. As the cable operators suggest, the future price cap regime may effectively prevent operators from shifting basic service programming costs to the non-basic tier. As we gain experience in rate regulation, we will reevaluate our position in light of these arguments. For the time being, however, we will require consistent rate approaches across tiers to guard against cost-shifting retiering strategies that subvert the initial rate-setting process.

16. We are also not persuaded that consistent rate treatment abandons the Cable Act's dichotomy between local and federal regulation of the different tiers, as cable operators allege. We have previously rejected the argument that the statute requires different substantive rate-setting standards.[25] As we have observed before, the Cable Act establishes different procedural regulatory schemes rather than a dichotomy of substantive rate standards for the regulation of service tiers. Accordingly, the statute's procedural dichotomy does not require that we allow cable operators to pick and choose substantive rate-setting standards.

17. Cable commenters also have not demonstrated that requiring consistent rate-setting across tiers will increase the number of cost-of-service showings made either at the Commission or at the local level. Indeed, other commenters contend the opposite.[26] We expect cable operators to submit cost-of-service showings in every case where such a showing is essential to ensure that systems are allowed to recover their costs plus a reasonable return. Furthermore, even if consistent rate treatment were to produce a greater number of cost-of-service proceedings, the preservation of the tier neutral benchmark system and the protection it affords subscribers (*i.e.*, elimination of the incentive for operators to shift costs), outweighs the administrative burden posed by such additional proceedings.

18. In essence, the cable operators urge us to allow them flexibility to pick and choose between benchmark and cost-of-service regulation in order to enable them to maximize total revenues derived from all regulated tiers. However, as we have noted previously in this docket, there is no "constitutional or statutory requirement that the Commission's regulatory scheme must enable cable operators to select the option that maximizes their financial position."[27] Moreover, as discussed above, the cable operators' proposal would undermine our policies regarding tier neutrality and cost shifting, which are designed to protect consumers from excessive rates. We therefore will require cable operators to use a consistent method of rate-setting for all regulated tiers during the first year of regulation.

19. For any cable operators that have become subject to regulation of basic or cable programming services and have filed rate justifications before the effective date of the amendment to Section 76.922(b) adopted herein, we will apply the following procedures. Where the cable operator has selected one rate-setting approach for one tier, the operator is bound to select the same rate-setting approach for all other tiers that become subject to regulation within one year of the date of initial regulation. Any such cable operator will have thirty (30) days from the effective date of this *Third R&O* to change a rate-setting justification filed prior to the effective date of this order. In such cases, the amended filing will govern initial rates as of the date it is filed. In this circumstance, the operator may rely, if it chooses, on its initial rate justification to justify its rates from September 1, 1993, (when potential refund liability would begin) until the date of its amended filing. Where a cable operator has already filed justifications for both basic and cable programming service tiers, and has selected different rate-setting approaches for different tiers of service, we will require such operators to establish consistent rate-setting methodologies for the period after the effective date of this order. Specifically, in such cases, the operator must refile within thirty (30) days of the effective date of this order, the rate-setting approach for one of the tiers, and this rate-setting election will govern initial rates for that tier as of the date it is filed. As in the first circumstance described above, cable operators who have filed inconsistent rate justifications may rely on those initial rate justifications to justify rates from September 1, 1993, until the date of their amended filings.

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franchising authorities the primary responsibility to regulate basic rates and only in limited instances do we regulate basic rates. *See Rate Order* at para. 55.

[23] NCTA Comments at 16; TCI Comments at 8. We reject TCI's argument that the Commission's proposed solutions to the "gaming" problem come "dangerously close to taking editorial control over the placement of programming." TCI Comments at 8. To the extent that TCI raises First Amendment concerns, we have found that rate regulation under the 1992 Cable Act pursuant to content-neutral standards does not implicate the First Amendment. *See Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* in MM Docket 92-266, 8 FCC Rcd at 5588 n.30. (1993). *See also Daniels Cablevision, Inc. v. FCC*, Civil Action No. 92-2292, slip op. at 13 (D.D.C. Sept. 16, 1993) (holding that the rate regulation provisions of the 1992 Cable Act are compatible with the First Amendment).

[24] TCI Comments at 16.

[25] *See Rate Order*, 8 FCC Rcd at 5875-76; *First Order on Reconsideration* at paras. 31-36.

[26] *See supra* note 12.

[27] *See Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 92-266, 8 FCC Rcd 5585, 5588 (1993).

20. Finally, because we are not requiring consistent rate justification indefinitely, we perceive no need to adopt rules today to govern the sharing of cost-of-service data among franchising authorities or between franchising authorities and the Commission. Rather, as we stated in the *Rate Order* at para. 149, we will review the franchising authority's cost-of-service determination on appeal pursuant to Section 76.944 of our rules to determine if there is a rational basis for that decision. To resolve any uniformity problems, if there is a complaint on file at the Commission regarding cable programming services tier rates at the same time an appeal is filed, we will endeavor to consider the complaint and the appeal simultaneously. We will, however, reverse the franchising authority's determination, and remand the case to the franchising authority, only if there is a misapplication of an existing Commission rule or policy.[28] If the Commission makes a determination on a cable programming services complaint based on a cost-of-service showing, the local franchising authority should use the analysis developed by the Commission with respect to the allocation of costs among tiers when evaluating any subsequent cost-of-service showing for the basic tier.

## V. ADMINISTRATIVE MATTERS

21. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis with respect to the *Third Report and Order* is as follows:

*Need and purpose for this action:* This action is taken to preserve the integrity of the tier neutrality and rate averaging principles underlying the benchmark regulatory approach established in the *Report and Order and Further Notice of Proposed Rulemaking* in MM Docket 92-266.

*Summary of issues raised by comments in response to the Initial Regulatory Flexibility Analysis:* No comments were received in response to the request for comments to the Initial Regulatory Flexibility Analysis.

*Significant alternatives considered and rejected:* The Commission considered and rejected allowing cable operators to choose different rate-setting methods across tiers when establishing initial rates.

## VI. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that, pursuant to authority granted in Sections 4(i), 4(j), 303(r), and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 543, this Third Report and Order IS ADOPTED amending Part 76 of the Commission's rules, 47 C.F.R. Part 76, as indicated in Appendix A.

23. IT IS FURTHER ORDERED that, the Secretary shall send a copy of this Third Report and Order to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.* (1981).

24. IT IS FURTHER ORDERED that the requirements and regulations established in this *Third Report and Order* shall become effective upon publication in the Federal Register.[29]

[28] Although this may on occasion result in different resolutions of question of fact by the Commission and the local franchising authority, this is a result contemplated by the Act in creating a dual jurisdiction regulatory scheme for cable rates. Moreover, we anticipate that in most cases, the second regulator will be informed by the decision reached by the first regulator.

[29] For reasons set forth in note 3 *supra*, we find good cause for making our amendments to Section 76.922 (b) effective upon publication in the Federal Register. *See* 5 U.S.C. Section 553 (d) (3).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**APPENDIX A**

Part 76 of Title 47 of the Code of Federal Regulations is amended to read as follows:

**Part 76 Cable Television Service**

1. The authority citation for Part 76 continues to read as follows:

**AUTHORITY: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 533, 535, 542, 543, 552 as amended, 106 Stat. 1460.**

2. Section 76.922 is amended by revising paragraph (b)(1)(i) and the introductory text of paragraph (b)(1)(ii) to read as follows:

**§ 76.922** ***Rates for the basic service tier and cable programming services tiers.***

* * * * *

(b) * * *

(1) The permitted per channel charge on the initial date of regulation shall be, at the election of the cable operator, either:

(i) a charge determined pursuant to a cost-of-service proceeding; or

(ii) the charge specified in paragraphs (b)(1)(ii)(A), (B), or (C) of this section, as applicable. Provided, however, that if within one year of becoming subject to initial regulation of one service tier, a cable operator becomes subject to initial regulation of another service tier or tiers, the cable operator must elect the same method of determining the permitted per channel charge for all regulated service tiers. The cable operator must maintain a consistent method for determining the permitted per channel charge across all service tiers for a period of one year from the date that the cable operator first becomes subject to regulation on either the basic service or cable programming services tiers.

* * * * *

**APPENDIX B**

**COMMENTS**
**MM Docket No. 92-266**

Austin, Texas, *et. al*

Cable Operators and Associations

Cablevision Industries, *et. al*

Community Antenna Television Association

Continental Cablevision, Inc.

Falcon Cable TV, *et. al*

GTE Service Corporation

Massachusetts Community Antenna Television Commission

Media General Cable of Fairfax County, Inc.

Municipal Franchising Authorities

National Association of Telecommunications Officers and Advisors, *et. al*

National Cable Television Association

New York State Commission on Cable Television

Tele-Communications, Inc.

Time Warner Entertainment Co., L.P.

**REPLY COMMENTS**

Austin, Texas, *et. al*

Cablevision Industries Corp., *et. al*

Continental Cablevision, Inc.

GTE Service Corporation

KBLCOM, *et. al*

Media General Cable of Fairfax County, Inc.

National Cable Television Association

Time Warner Entertainment Co., L.P.

Viacom International, Inc.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 92-76**

In the Matter of

Amendment of the Commission's Rules
to Establish Rules and Policies
Pertaining to a Non-Voice,
Non-Geostationary Mobile-
Satellite Service

**REPORT AND ORDER**

**Adopted: October 21, 1993; Released: November 16, 1993**

By the Commission: Commissioner Barrett issuing a statement.

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## I. INTRODUCTION

1. By Notice of Proposed Rulemaking (*Notice*),[1] we proposed the revision of Part 25 of the Commission's Rules to accommodate the licensing and operation of a non-voice, non-geostationary (NVNG) mobile-satellite service (MSS).[2] In response to the *Notice*, seven parties filed comments and seven parties replied.[3] By this Order, we adopt those regulations, with some modification.

2. There are three applicants seeking Commission authorization to operate NVNG mobile-satellite systems: STARSYS Global Positioning, Inc. (STARSYS), Volunteers in Technical Assistance (VITA) and Orbital Communications Corporation (ORBCOMM). NVNG systems will be capable of providing nation-wide, two-way data communications and position location services, using low-cost and extremely portable transceivers. Potential applications, as envisioned by the applicants, are myriad, ranging from tracking of stolen vehicles to ubiquitous, real-time personal and business communications. In January, the Commission allocated spectrum to the NVNG mobile-satellite service, and adopted the *Notice* proposing regulations to govern its implementation. Although not wholly free of controversy, the comments in this rulemaking expressed general satisfaction with the substance of the rules proposed. This common support, particularly in light of the technical complexities of the NVNG service, is due in large part to the cooperation of those affected parties who assisted the Commission in the development of regulations through the negotiated rulemaking process.[4] The parties' willingness to participate in the Commission's initial negotiated rulemaking process, to expend the considerable effort required and to effect reasonable compromises when necessary, has greatly assisted Commission staff and has streamlined this rulemaking process.

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[1] Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Non-Voice, Non-Geostationary Mobile Satellite Service, 8 FCC Rcd 6330 (1993).

[2] We also proposed a minor addition to Part 2 of the Rules.

[3] A list of commenters is attached as Appendix A. In addition to those statements filed during the requested comment and reply periods, two parties also filed Supplemental Comments to which one party replied. In its May 26 Reply, dbX Corporation (dbX) submitted detailed technical comments. The parties filing Supplemental Comments object to this Reply, alleging that it is not based on newly-available information and should have been submitted earlier in the comment cycle to allow them an opportunity to respond. dbX subsequently objects to the acceptance of the two Supplemental Comments. We will consider them all. Section 1.415(d) of the Commission's Rules, 47 C.F.R. 1.415(d), states that additional comments may be filed in a rulemaking proceeding only if authorized by the Commission. Because of the complex nature of the dbX Reply, we believe that the parties should be allowed to respond. The consideration of all of the disputed pleadings will improve the record in this proceeding. We thus reject the notion that acceptance of the Supplemental Comments undermines the integrity of our process, and will accept them as part of the record.

[4] A list of participants in the Commission's negotiated rulemaking in Docket CC 92-76 is available in Attachment 2 to the Report of the Below 1 GHz LEO Negotiated Rulemaking Committee (Report), dated September 16, 1992.

## II. DISCUSSION

### A. Applications for Space Station Authority.

3. *System size.* While the comments express support for virtually all of the space station application technical requirements that were recommended by the Negotiated Rulemaking Committee (Committee), modifications were suggested to some subsections of 25.142. Proposed section 25.142(a)(1) requires an NVNG applicant to specify the precise number of space stations that it will launch and operate in its proposed system. VITA suggests that applicants instead be granted authority to launch and operate a requested range of satellites, with a minimum of two. VITA alleges that this flexibility in system design will allow a licensee to choose, as its service develops, the number of satellites that most effectively and efficiently reaches its intended customer base. In essence, VITA's proposal would give licensees a predetermined "set aside" for future expansion.[5] While this flexibility could enhance the commercial viability of an NVNG system, it could also hinder the plans of future NVNG MSS providers. System size, particularly when a system has a small number of satellites, will have a decided impact on future entry. For example, the Committee noted in its Report that additional NVNG systems could likely be able to share the same orbit(s) with VITA's two satellite system if station keeping and other sharing methods are employed. Such an accommodation would be difficult, if not impossible, if licensees are given carte blanche unilaterally to increase system size, even within preordained parameters. Conversely, if a system operator decides that its customers will be best served by the minimum number of satellites specified in its license, any potential for additional service will lie fallow for the remainder of the license term. We therefore continue to believe that it is prudent to require applicants to specify precisely the number of satellites reasonably anticipated to meet their needs. There were no further comments regarding sections 25.142(a)(1) and (2), and we adopt them as proposed.

4. *Emissions limitations.* STARSYS asks the Commission to clarify that proposed section 25.142(a)(3) merely requires NVNG systems to comply with section 25.202(f) emissions limitations on out-of-band transmissions, and does not prohibit the retransmission of signals from a source outside of the system. We agree that clarification is necessary. As discussed in the *Notice*, our primary concern in the development and inclusion of this rule has been the control of in-band emission levels.[6] An NVNG satellite, which is designed to receive signals from small, omnidirectional antennae, will receive not only those signals intended for retransmission by the system, but any signals within its broad operating footprint that are transmitted on the same frequencies. In the case of NVNG systems, it is likely, for example, that transmissions from Canadian terrestrial paging systems operating in the 148-149.9 MHz band will be received by U.S. licensed NVNG systems, which are authorized to operate in those same frequencies. Retransmission of these "out-of-system" signals by the NVNG satellite at 137-138 MHz and 400 MHz could ultimately increase the system's power flux density levels at the earth's surface. This could in turn result in harmful interference to other authorized users of the affected frequency bands. We have therefore amended section 25.142(a)(3) to conform to our expressed intent of protecting in-band services from harmful interference due to unacceptable power flux density levels. Although we originally noted our intent to prohibit entirely the retransmission of any out-of-system signals by an NVNG satellite, we have modified this position and have adopted a method that will allow applicants greater flexibility in the implementation of their systems. Specifically, new section 25.142(a)(3) prohibits the retransmission of signals received by an NVNG satellite from a source outside of the system at power flux density levels exceeding those described by the applicant in response to the preceding section 25.142(a)(2). We thereby will limit the harmful effect of unintended signal retransmissions, but will permit the licensee to determine its preferred method of meeting those limits.[7] We believe that this rule is necessary to protect other authorized users in the 137-138 MHz and 400 MHz bands from excessive interference resulting from undesired emissions, yet will allow reasonable opportunity for system operators to develop various transmission schemes. We therefore adopt section 25.142(a)(3) as modified.

5. *Financial Qualification.* Section 25.142(a)(4) establishes the financial qualification requirements for applicants in the NVNG mobile satellite service. Specifically, an applicant must demonstrate the current financial ability to construct, launch and operate for one year the first two satellites in its system. VITA urges the Commission to adopt a separate financial showing for smaller applicants, noting that it is unfair to require applicants with modest system plans to demonstrate the same financial wherewithal of applicants with larger, more expensive proposals. VITA therefore suggests that we require an applicant proposing to launch five or fewer satellites to demonstrate the financial ability to construct, launch and operate for one year only the first satellite in its system. ORBCOMM suggests that adoption of VITA's suggestion may unduly complicate the rules, and alleges that the company's concerns can adequately be addressed through waiver of the final rules. While this rule will require a smaller system applicant to demonstrate a proportionately high percentage of its necessary capital, we do not believe that it is unfair or unduly harsh. The financial requirements that we are adopting today are not as rigorous, for example, as those in the fixed satellite services.[8] Further, there is little reason to

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[5] The VITA proposal would conversely allow a future applicant unilaterally to reduce the size of its intended system. We assume, however, that the basic intent of this proposal is to allow room for system expansion.

[6] Out-of-band emissions are already controlled by §25.202(f).

[7] Signal demodulation-remodulation at the space station, while a possible solution to any problems arising from out-of-system retransmissions, may not be a licensee's preferred method of reducing power flux density levels. For example, a licensee may alternatively employ notched filters, "hard limiting" methods such as clipping circuits, or other techniques to eliminate any undesired in-band signal emissions.

[8] *See, e.g.*, §25.140(b), which requires domestic fixed satellite applicants to demonstrate the current ability to construct, launch and operate for one year each individual satellite proposed. At worst, as in the case of VITA's two-satellite proposal, the NVNG financial qualification standard would be no more onerous than that imposed on fixed satellite applicants. Indeed,

distinguish among large and small system proposals, as a small NVNG system may utilize as much of this very limited spectrum resource as a larger system.[9] Accordingly, we agree that adoption of this modification may unduly complicate the rules, and could jeopardize the public interest in the availability of NVNG services and the efficient use of the spectrum allocated to this service. VITA may seek a waiver of this standard, at which time we would consider whether the size of its system and the noncommercial nature of its operations warrant an exception being made.

6. VITA further requests that we accept, as meeting the financial qualification requirements of section 25.142(a)(4), copies of grant commitment letters or other evidence of external funding commitments. It is apparent that a binding grant commitment letter would fall well within the intent, albeit not the precise wording, of the existing regulation. While we agree with ORBCOMM that it would unduly complicate our rules to establish a separate category of funding possibilities for "noncommercial" applicants, we believe that grant commitments in general may provide the same level of financial certainty as those other submissions currently accepted as demonstrating an applicant's financial qualification. As in the case of other acceptable debt or equity financial showings, the grant commitment must be specifically described, and must not rest upon contingencies that require further action by the parties. We therefore amend Section 25.140 of our rules to add a new paragraph which specifically permits an applicant to submit evidence of grants, or other external funding commitments, in support of its application.[10] We further adopt section 25.142(a)(4) as set forth in Appendix B,[11] as well as section 25.114(c)(18), which cross-references this new subsection.

7. *Replacement space stations.* STARSYS, VITA and Space Technology Systems International (STSI) comment on the specifics of our proposal to allow licensees, upon prior written notice to the Commission, to replace space stations during the system license term. Proposed section 25.142(a)(5) will allow operators at their discretion to replace failed or expired space stations with technically identical counterparts at any time during the license term. The commenters urge that, instead of requiring space stations to be technically identical to those replaced, a replacement space station be only "operationally equivalent" to its predecessor in terms of its interference potential. In support of this concept, STARSYS notes that evolving manufacturing efficiencies and technical advancements are inevitable, and will facilitate greater system utility and efficiency. Thus, state-of-the art replacement satellites may have different, albeit equivalent, technical parameters. Adoption of this "operationally equivalent" standard, they argue, will promote the continual upgrade of space station systems, to the benefit of the operators and their customers. While we believe that both technical innovation and operator flexibility serve the public interest, we must, consistent with our statutory obligation, assure the continued compatibility of NVNG systems with those of other licensed spectrum users. If a space station design differs from that initially examined and approved, we are not only obligated, but are also in the best position, to determine neutrally whether the existing and replacement space stations are indeed operationally equivalent. We do not believe, on balance, that it will be unduly burdensome for operators to request license modification if they desire to upgrade or in any other way change their licensed satellite design. This requirement will not impede technical innovation in satellite design, but is necessary to ensure the fulfillment of our statutory mandate. Therefore, absent an accompanying request for license modification, we will require replacement space stations launched during the license term to be technically identical to those replaced. We accordingly adopt section 25.142(a)(5) as proposed.

8. *Intersystem coordination.* The commenters did not object to, or request modification of, our proposed rules sections 25.142(b)(1) and (2). These subsections require applicants to coordinate their systems with Federal government users prior to authorization. Nor was there any objection to the reminder, expressed in section 25.142(b)(4), that NVNG services may be subject to certain provisions of the Communications Act relating to safety and distress communications. We continue to believe that these portions of sections 25.142 are in the public interest, and adopt them with minor modification.[12] dbX and Leo One Corporation (Leo One)[13] allege, however, that proposed sections 25.142(b)(3) does not place the NVNG licensees under a sufficiently strict obligation to coordinate their systems with those of future licensees. dbX thus requests that (1) each NVNG license bear a condition requiring the licensee to negotiate coordination agreements in good faith with subsequent licensees, (2) the coordinating parties file written progress reports with the Commission every three months detailing their efforts, and (3) these final coordination agreements be publicly available for use by future licensees.

9. At the outset, we reiterate our firm belief that the good faith coordination efforts of all spectrum users are essential to the development and efficient use of the electromagnetic spectrum. We believe, however, that our intersystem coordination rule, in conjunction with existing policy, will provide the relief desired by dbX. New section 25.142(b)(3) requires licensees and permittees, at the Commission's request, to cooperate fully in the coordination and accommodation of future systems.[14] By this rule, we

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the costs of constructing and launching a low-earth orbit satellite are likely to be significantly less than the construction and launch costs of a geostationary satellite.

[9] Even a small NVNG system will require significant use of this very limited spectrum resource. *See* ORBCOMM's Comments, in which they allege that a two satellite system, which would be visible in the U.S. for approximately 20% of the time, will consume the same interference budget for coordination with other systems as a twenty satellite system, which could provide nearly full time availability in the U.S.

[10] *See* §25.140(d)(2)(iii).6

[11] We have amended this section slightly from that originally proposed by citing further Commission decisions regarding licensing requirements for international satellite systems.

[12] We have modified §25.142(b)(4) to identify more precisely those situations in which NVNG operations may be subject to §§321(b) and 359 of the Communications Act.

[13] STSI concurred in Reply comments.

[14] In response to concerns expressed by dbX and STSI, we will specifically require licensees to coordinate their frequency modulation compatibility with future licensees. We expect coordination discussions among frequency division multiple access/time division multiple access (FDMA/TDMA) licensees to include at least a description of the existing licensee's channel assignment

may require licensees to coordinate not only with future licensees, but with future applicants as well. While we will continue initially to rely on the good faith efforts of existing spectrum users to cooperate with new licensees, we have stated our intent to intervene at an early stage if such cooperation is not forthcoming, or if earlier coordination would be particularly helpful.[15] Accordingly, we believe that this proposal will enable us to assure good faith cooperation on the part of all parties providing, or seeking to provide, NVNG MSS.

10. With regard to the request to file periodic written reports on the status of coordination negotiations, we do not believe that such reports will create greater incentives for licensees to coordinate with each other, and may simply complicate the process with an inconclusive paper trail. If a licensee is not cooperative, we expect to be so informed by the aggrieved party. At that point, we will, as we have stated in the past, assist in the coordination process, or grant such other relief as seems appropriate.[16] Finally, we agree with STARSYS that the relative benefits of making coordination agreements publicly available are unlikely to outweigh the potential damage to licensees through the release of confidential and proprietary data. Data made publicly available by the Commission would unavoidably become accessible to the world at large. This could prejudice the negotiating posture of the licensees in their domestic, and perhaps myriad international, coordination efforts. As ORBCOMM notes, the existing applicants were able to coordinate their systems without benefit of exact data regarding existing systems. We believe that, in light of our ability to require pre- and post-licensing coordination efforts, and our willingness to provide informal assistance if necessary, future applicants will have ample access to the data necessary to design and implement their systems. Accordingly, we adopt section 25.142(b)(3) as proposed.

11. *Reporting requirements.* Finally, objection was raised to the reporting requirement set forth in proposed section 25.142(c).[17] STARSYS believes that this requirement is unnecessarily burdensome, and unlikely to generate useable information that cannot readily be obtained by the Commission should the need arise. It argues that the potential damage from disclosure of commercially sensitive information far outweighs any potential benefit to be gained therefrom.[18] We believe that STARSYS underestimates the value to the Commission of the data submitted by licensees in similar semi-annual reports. For example, review of this information is the primary manner by which we assess the commercial and technical development of a particular satellite service. This assists us in analyzing spectrum utilization matters, such as the availability of service on a common carriage basis and consumer demand for particular service options. Further, we are required by law annually to report on competitive market conditions in the mobile communications marketplace.[19] We thus conclude that the solicitation and review of this type of information is important to fulfilling our responsibilities under the Communications Act. While we understand STARSYS's reluctance to file commercially sensitive data, system usage information is intended for use by the Commission and can reasonably be shielded from public dissemination by requests for confidential treatment.[20] To lessen the burden on licensees, we have modified the proposed rule, and now request only the annual submission[21] of that information we believe necessary to enable us to meet our public interest responsibilities and legislative directives. Accordingly, we adopt a modified section 25.142(c), which requires submission of the following information on June 30 of each year: (1) a listing of non-scheduled space station outages lasting more than thirty minutes and the cause(s) of such outages; (2) a detailed description of the utilization made of the in-orbit satellite system; and (3) identification of any space stations not available for service or otherwise not performing to specifications, the cause(s) of these difficulties, and the date any space station was taken out of service or the malfunction identified.

**B. Applications for Transmitting Earth Station Authority.**

12. Specific earth station, or transceiver, licensing requirements are set forth in section 25.135. The commenters universally support the concept of the issuance of a blanket license for NVNG user transceivers.[22] Prior to issuance of this blanket transceiver license, an applicant must demonstrate that transceiver operations will not interfere with existing and authorized uses of the affected or adjacent frequencies. Further, as proposed in the *Notice*, certain transceivers will be required to bear a label prohibiting their use aboard commercial aircraft. This prohibition has been included to preclude potential interference of NVNG

scheme in the frequency and time domains, and the maximum number of simultaneous transmissions. Among code division multiple access (CDMA) spread spectrum licensees, we anticipate the identification of the existing licensee's code family, the pre-selected codes and the maximum number of simultaneous transmissions in a service area.

[15] Furthermore, since frequencies are not exclusively assigned to any licensee, the coordination process may result in a reduction of the operational flexibility of an existing system. For example, in the case of an FDMA system, the total number of accessible service channels may be reduced in the uplink to accommodate feeder links for each system. However, such a reduction should not affect the system capacity, because we expect that the system will be limited to a maximum number of simultaneous users less than the total number of available channels. In the case of a CDMA system, the interference power into the downlink may be increased in some band segments to accommodate future feeder links as well.

[16] dbX suggests that if parties fail to coordinate, they should be required to default a prearranged amount of spectrum/power. We do not believe that preordained, inflexible penalties are desirable.

[17] dbX believes that this proposed rule should require licensees to submit additional information upon which to base a detailed analysis of an operator's actual spectrum usage. The proposal is discussed in paragraphs 19 and 20, *infra*.

[18] VITA agrees with STARSYS, and questions whether the value of such information to the Commission will outweigh the licensee's cost of additional recordkeeping and paperwork.

[19] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §6002(b), 107 Stat. 312 (approved August 10, 1993); H.R. Rep. No. 103-213, 103rd Cong., 1st Sess. (1993) (Conference Report).

[20] *See* 47 C.F.R. §0.459.

[21] dbX suggests that submission of this information on an annual date certain will assist the Commission in making relative and comprehensive assessments of the various operations. We agree, and will include a specific date for submission of these annual reports in the new rule.

[22] *See* para. 15, *infra*.

transceivers with navigation and other aircraft functions. There was no opposition to these provisions, and we continue to believe that they are appropriate for the protection of existing frequency users. We therefore adopt section 25.135(a) and (b) essentially as proposed.[23]

13. Sections 25.135(c) and (d) clarify the basic tenets that NVNG transceivers operating in the United States must communicate with or through U.S. authorized space stations only, and that such communications must be authorized as well by the space station licensee or an authorized vendor. STSI asks that we devise a rule that will allow domestically authorized user transceivers to access foreign-licensed NVNG space station systems.[24] We do not believe that this type of arrangement should be dealt with by regulation. In the past, arrangements for U.S. licensees to access foreign space stations for either domestic or international use have been made on a bilateral, government-to-government basis. We believe that we will best be able to determine the extent to which such access should be permitted by continuing this approach. The rules that we adopt today would not preclude entering into arrangements for such access with countries that license non-geostationary satellite systems and permit roaming by areas having technically compatible transceivers designed to operate with systems licensed in the United States.

14. Once authorized to access a U.S.-licensed space station system, a roaming user's transceiver operations will be deemed to fall within the umbrella of the blanket earth station license.[25] held by the system operator or service vendor authorized by the system licensee. Because of the large number of technically identical terminals, and the likely short-term use of a roaming unit within the United States, it would be an unnecessarily onerous burden to require issuance of a separate license to each individual transceiver user. By placing the ultimate responsibility for transceiver operations upon the system operator or service vendor as earth station licensee, we believe that the public interest can be well protected[26] without inhibiting the use of these units by unnecessary licensing burdens.[27] Thus, we adopt sections 25.135(c) and (d) as proposed.[28]

**C. License Terms and Renewals.**

15. *Earth stations.* NVNG subscriber user transceivers will be authorized pursuant to "blanket" earth station licenses, whereby a single licensee will be responsible for the operations of a specific number of technically identical units. As proposed in the *Notice*, the ten-year license term will commence on the date that the earth station license is granted. There were no objections to these provisions, and we adopt sections 25.115(d) and 25.133(b) as proposed.

16. *Space stations.* As in the case of NVNG earth stations, we have proposed a blanket licensing approach to the authorization of NVNG space stations. Entire satellite systems in this service will be licensed to operate for periods of ten years, commencing upon the date that the licensee certifies that its first satellite is successfully placed into orbit and operational.[29] The operating license of all other system satellites launched within the ten year period will expire on that same date.[30] Applications to renew a space station system license must be filed by the end of the seventh year of the existing system license. As STARSYS and ORBCOMM point out, this period of time will allow the Commission sufficient time to act on replacement applications, will give interested parties adequate notice of an operator's intent, and will not unduly force existing licensees into premature decisions.

17. In the *Notice*, we stated that NVNG licensees, like licensees in other satellite services,[31] will generally be given replacement system authority if the frequencies remain available for use by comparable types of systems. Two of the applicants request that we codify this system replacement expectancy, noting that not only are NVNG systems expensive to construct and operate, but that NVNG customers deserve the assurance of continued service availability. Accordingly, STARSYS and ORBCOMM suggest adoption of a rule that will assure system operators of reauthorization so long as they have a record of consistent regulatory compliance. At a minimum, STARSYS argues, we should incorporate a rule that embodies our policy generally to authorize replacement systems if the frequencies remain available. As we stated in the *Notice*, any number of intervening circumstances may inhibit our grant of replacement authority. We are therefore reluctant to attempt to define the exact terms under which we will grant replacement system authority ten years hence. For example, at that time, we may have devised efficiency standards, which could interfere with our ability to reauthorize an existing type or size of system. Rather than attempt to create at this time an exhaustive list of conditions precedent to the grant of replacement authority, which list may alternatively prove to be either too inclusive or too exclusive, we continue to believe that our general policy will most accurately meet the public interest. This policy will provide NVNG operators with assurance that we generally intend to grant replacement system authority, but will not hobble our ability to examine all factors that may ultimately prove relevant to such a grant. Accordingly, we adopt proposed sections 25.120(d) and (e) in their entirety.

**D. System Construction/Milestones.**

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[23] Section 25.135(b) has been modified slightly to clarify that this subsection does not apply to transceiver units *whose receivers* are incapable of radiating in the 108-137 MHz frequency band.

[24] LEO ONE concurs.

[25] Blanket transceiver licenses are authorized by §25.115(d), adopted today.

[26] Each transceiver's access to the space station can be individually controlled by the licensee.

[27] This approach also will permit foreign users to acquire and operate transceivers in the United States without individual licensing.

[28] We also adopt §25.130(b) which cross-references new §25.135.

[29] Section 25.120(d)(2). The applicant's space station construction permit and its subsequent launch and operating license, while embodied in the same document, are distinct authorizations.

[30] This will encompass all space stations launched during the ten year license term, as discussed at para. 7, *supra*.

[31] Licensees in the fixed-satellite service, for example, have no codified replacement expectancy.

18. Space station system licensees will be required to notify us when their first system satellite is launched and operational. Milestone deadlines, which are the dates by which construction of a system must be commenced and completed and satellites launched, will not be codified but will be established in each individual license. This will allow us to consider an individual applicant's circumstances when developing these guidelines. As a general matter, a permittee must commence construction of the first two satellites of its system within one year of grant of the construction permit, and begin construction of all remaining satellites within three years of grant. Construction of the first two satellites must be completed within four years of grant and the entire system must be launched and operational within six years. VITA urges the Commission to modify its milestone proposal to reflect the realities of smaller systems. The company suggests that it is unduly burdensome to insist that a permittee of a small system be compelled to commence construction of such a proportionately high number of satellites within the first year. Instead, VITA suggests that a system permittee proposing to operate five satellites or fewer be required to commence construction of only a single satellite within the first year. While we decline to create a specific policy regarding system milestones for permittees proposing to operate fewer than six satellites, we agree with VITA's general assessment. It is this type of situation that underlies our determination not to codify absolute milestone limits, but to retain the flexibility to consider all factors involved in their imposition. STARSYS, while supporting VITA's suggestion, urges the Commission to ensure that milestone commitments be fairly and similarly imposed. ORBCOMM, noting that our newly-adopted financial qualification requirements are perhaps too lax, warns us to enforce these commitments strictly. In light of the expressed concern over the adequacy of the allocated spectrum and the possibility of warehousing this scarce resource, we do indeed intend to continue our longstanding policy of equitably imposing, and enforcing, milestone commitments.

**E. Frequency Assignments.**

19. We have proposed that each applicant specify precisely the frequencies that it intends to use for its service and feeder links. If the proposed operations appear compatible with other authorized uses, we will license the applicant to use the requested frequencies on a non-exclusive basis. This section raised considerable controversy. Arguing that the spectrum sharing scheme proposed by the applicants in the negotiated rulemaking will result in both an undesirable duopoly[32] and spectrum warehousing, dbX proposes that we instead (1) make frequency assignments based on our assessment of an applicant's "real near term requirements,"[33] and (2) allow system expansion only after a licensee is able to demonstrate a specific level of system usage. dbX has presented a sample spectrum sharing proposal that increases the potential for future entry (vis-a-vis the sharing plan proposed by the applicants) by reducing the existing applicants' proposed system capacity. dbX fails, however, adequately to address the possibility that such further reduction in system capacity[34] may jeopardize the viability of these proposed systems. Indeed, STARSYS states that further cuts in capacity would threaten its system's viability. We have no reason to doubt STARSYS's assessment. This is a first generation service. We do not know how quickly, or in what manner, the service will grow. The applicants have presented us with their own best estimates regarding their actual spectrum usage requirements. Different, arbitrarily imposed limits on system size could force a licensee into what may very well be an artificially, and unsupportably, low system capacity.

20. If inadequate capacity is licensed initially, the problem is not easily resolved. Once LEO satellite systems are placed in orbit, they cannot, as ORBCOMM points out, be expanded to meet demand until the next generation is launched. By that time, expansion may be hindered by other factors. Licensees will have six years to commence operation of their systems. By the time they are launched and filled to the capacity suggested by dbX, there may be no room for these first generation systems to expand. Indeed, system capacity may have to be decreased over time as U.S.-authorized NVNG systems coordinate their operations with those of neighboring jurisdictions.[35] If we grant licensees access to only a bare minimum amount of spectrum,[36] it is thus conceivable that their systems will prove too limited to serve customer needs or achieve commercial viability. While maximum entry has always been a major concern in the evolution of this service, it must not take precedence over our ability to license viable systems.

21. We would be more likely to entertain the notion of imposing our own limits on a licensee's spectrum usage and power levels if we had sufficient information regarding the ultimate commercial and technical development of the NVNG MSS, or if the first round applicants proposed to use all of the available spectrum. However, we are not prescient, and the applicants do not propose to occupy the entire NVNG spectrum resource. Some unassigned NVNG spectrum remains available under the applicants' sharing proposal, additional allocated spectrum should become available for use in 1997 and beyond,[37] and the majority of the spectrum that will be non-exclusively assigned to licensees can be used by future licensees as well.[38] Accord-

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[32] dbX cites a General Accounting Office Report for the proposition that a market with only two providers is unlikely to have a competitively set price. We agree with ORBCOMM that dbX ignores the facts that (1) interservice competition exists from terrestrial and satellite-based systems, and (2) intraservice competition will exist among not only the current, but also future, systems and resellers. *See Notice* at para. 35.

[33] RadioMail Corporation agrees that initial frequency assignments must similarly be limited. Such an incremental approach to frequency assignment, it alleges, will ensure that the maximum number of systems have access to the spectrum. *But see* para. 20, *infra*.

[34] As VITA points out, the existing applicants have already decreased their proposed system capacity to effect the spectrum sharing arrangement that they proposed in the negotiated rulemaking.

[35] This includes coordination with the terrestrial, as well as NVNG MSS, services of affected administrations.

[36] Or similarly limit acceptable power levels.

[37] *See Report, supra*, at p. 9.

[38] Both ORBCOMM and STARSYS continue to assert their abilities to share their proposed service link frequencies with future systems. Because we believe that ORBCOMM's proposed Dynamic Channel Activity Assignment System can effectively allow sharing of the proposed service link frequencies, we will not adopt dbX's suggestion that the pool of channels available to an individual FDMA/TDMA operator for mobile-to-satellite

ingly, we will continue to leave decisions regarding appropriate system size and configuration to the applicants themselves.[39]

**F. Spectrum Efficiency.**

22. From its inception, the Commission has been charged with making available to the American people a rapid and efficient communications service.[40] With that in mind, we have undertaken from the beginning of this rulemaking the development of rules that will further the efficient use of the NVNG MSS spectrum. During the course of the negotiated rulemaking, the Committee debated at great length the possibility of imposing concise spectrum efficiency requirements upon NVNG space station operators. These discussions failed to elicit a sound, mutually agreeable solution. Accordingly, we proposed in our *Notice* to defer the imposition of efficiency standards until we can examine the technical and commercial development of the service.

23. As an initial matter, the commenters unanimously agree that it is inadvisable at this time to mandate a single modulation and accessing technique for this service. There is no current need, and indeed no factual basis upon which, to do so. ORBCOMM, however, urges our reconsideration of an efficiency standard that the company has advanced throughout the course of this rulemaking. Generally, that standard would require system operators to make service available in the United States at least 75% of the time. This proposal, as well as others, was discussed at length in the negotiated rulemaking. During those meetings, the Committee was unable even to define the concept of efficiency as it relates to this service. The problems that plagued the Committee during its deliberation of this subject remain. We have no experience with commercial NVNG MSS systems operating in these frequency bands. Without experience, we do not know which technologies will even prove workable, much less preferable, as different services attempt to coexist within this particular spectrum. Further, we do not know how consumer demand for services will evolve in the NVNG MSS. In any event, it is not "efficient" to mandate at this time either use of a technology that may not work, or a level of available service that may not be supported by the market. We do expect to address the issue of efficiency standards in future proceedings.[41]

**G. Miscellaneous.**

24. *Regulatory Treatment.* In the *Notice*, we proposed that applicants be allowed to request classification as either common or private carriers. In accordance with existing policy, the Commission would then determine whether such classification would be in the public interest.[42] The comments universally supported this proposal. Since adoption of the *Notice*, section 332 of the Communications Act, 47 U.S.C. §332, has been amended to establish a new category of mobile services called "commercial mobile services" (CMS).[43] Section 332 now requires that CMS providers be treated as common carriers, but the Commission has authority to forebear from most Title II regulation for CMS providers.[44] Subsection 332(c)(5), however, states that the Commission may continue to determine whether the provision of space segment capacity by satellite systems to CMS

links be limited to 40. Nevertheless, should service link sharing not prove satisfactory, the Commission may establish such limits.

[39] While we do not believe that it is necessary to place prescribed limits on system power levels or the amount of available operating frequency, we may find it necessary to relocate a licensee's operations within the spectrum in an effort to coordinate future systems. In addition, dbX offered suggestions, which we have implemented herein, that could similarly facilitate future entry, and will not unduly burden or impede the plans of existing applicants. *See* n.14, *supra*.

[40] Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. §151.

[41] ORBCOMM urges us at least to require applicants to make some showing of spectrum efficiency. While it seems unreasonable at this time to require applicants to develop or observe a prescribed methodology, we believe the annual reports will serve this purpose. *See* para. 11, *supra*.

[42] In making this determination, the Commission looks to an array of public interest considerations. *See, e.g., Second Report and Order* in Gen. Docket 84-1234, 2 FCC Rcd 485, 490 (1987) (because only a single mobile satellite service license would be granted, the space segment operator was placed under an obligation to provide service on a non-discriminatory, common carriage basis); *see also Second Report and Order* in Gen. Docket 84-689, 104 FCC 2d 650, 665-666 (1986) (radiolocation is not inherently common carrier in nature under the test of National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 830 (D.C. Cir.); *cert. denied*, 425 U.S. 999 (1976) (common carrier obligations would impede the ability of mobile satellite service operators to tailor services to meet their customers' needs).

[43] Omnibus Budget Reconciliation Act of 1993, *supra*, n.19.

[44] Matters pertaining to the definition and regulation of commercial mobile services are generally being considered in a separate docket. *See Notice of Proposed Rule Making to Implement Title VI of the Omnibus Budget Act of 1993*, Docket No. 93-252, FCC 93-454 (released October 8, 1993) ("CMS Notice"). The Commission may not forebear from enforcing §§201, 201 and 208 of the Communications Act as to CMS providers.

providers should be treated as common carriage.[45] Accordingly, we believe that we continue to have the discretion to make determinations regarding the regulatory classification of NVNG space station licensees. As we stated in the *Notice*, NVNG services are not inherently common carrier in nature under the guidelines of the *NARUC I* decision.[46] Accordingly, we will not require NVNG space station licensees to provide system access to CMS providers on a common carriage basis. However, earth station licensees will be treated as common carriers if their service offerings fall within the new definition of CMS.[47] We also proposed that NVNG licensees operating as common carriers should be subject to streamlined regulation. We will adopt that proposal, as we believe that it will ease the regulatory burden on NVNG licensees, without harm to the public interest. Thus, all NVNG common carrier space and earth station licensees will be subject to streamlined regulation. In addition, we note that the issue of forebearance from tariff regulation of domestic CMS providers is now under consideration in the CMS Notice.

25. *Application amendments.* In the *Notice*, we suggested that applicants be given 90 days in which to amend their applications to conform to the new regulations. STARSYS argues that it is unrealistic to expect applicants to make all necessary changes in system design and business plans and to secure reasonable financial commitments within ninety days of adoption of final rules. It therefore proposes that applicants be given nine months in which to meet the newly-imposed financial showing. dBX argues that initial applicants will not be disadvantaged because it has been apparent for some time that all existing applicants can be accommodated within the available spectrum and are thus likely to be licensed. We agree with dbX that financial arrangements could well have commenced prior to the completion of this rulemaking. While the final rules have only been established today, their probable substance has been largely apparent for some time. In light of the fact that the financial qualification standard adopted today is not onerous, we do not feel that it will be in the public interest to bifurcate and extend the amendment period, and thus further to delay licensing of these systems. We therefore will allow applicants in this processing round 90 days from the effective date of these regulations in which to file all conforming amendments and fees for system construction, launch and operation.

26. STARSYS also requests clarification that all system amendments necessary to bring applications into conformance with these newly-imposed rules will be accepted without procedural disadvantage to the applicants. For example, if certain of these amendments were deemed, under ordinary circumstances, to be "major" amendments,[48] the entire application would be considered newly-filed as of the date of the amendment. The application would then no longer be eligible for consideration in this processing round, because of its failure to be properly on file as of the original application cut-off date. Therefore, we clarify that to the extent that amendments are necessary because of obligations that we have imposed upon applicants after the cut-off date, the amendments will be accepted without adverse consequence. We emphasize, however, that only necessary amendments will be accepted unconditionally. All others will be treated under the existing procedural regulations.

27. *International obligations.* dbX requests that we impose license conditions on NVNG MSS service providers, requiring the successful completion of both domestic[49] and international coordination of their systems prior to grant. The International Telecommunication Union (ITU) has established a procedure governing the coordination of mobile satellite systems. That procedure assures that worldwide coordination is accomplished in a manner that places the burden on both the affected administration and the administration seeking coordination to cooperate in the resolution of conflicts.[50] ITU regulations do not, however, require successful coordination of a system prior to licensing by an individual administration.[51] Such a requirement could empower another administration to employ dilatory tactics merely to impede implementation of U.S. systems.

28. In a similar vein, Leo One urges the Commission to consult with "appropriate ITU organizations" before the promulgation of final rules that, it alleges, may foreclose competition and promote spectrum inefficiency. While the United States is an active participant in a number of global fora, including the ITU and its Radiocommunications sector, we believe that it is unnecessary and imprudent to await further global action on LEO MSS issues prior to the promulgation of wholly domestic regulations. Such a delay would needlessly hamper the efforts of domestic licensees to make available to the U.S. public these innovative services. As we stated in the *Notice*, we will follow the coordination procedures prescribed for non-geostationary satellite systems;[52] will work with the global community to promote LEO services through discussion of sharing techniques and other technical issues; and will continue to require our licensees to meet both their international obligations and any national requirements imposed by other licensing administrations. Because we will require our licensees to comply with international procedures, including the national requirements of any other licensing ad-

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[45] Amended section 332(c) does not alter or affect the regulatory treatment of Comsat required by Title IV of the Communications Satellite Act of 1962. Communications Act §332(c)(4), 47 U.S.C. §332(c)(4). NVNG space and earth station licensees that intend to provide international common carrier services must further secure certification pursuant to Section 214 of the Communications Act, 47 U.S.C. §214.

[46] *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir.) *cert. denied* 425 U.S. 999 (1976).

[47] *See* CMS Notice, *supra* n.44.

[48] *See* Section 25.116(b).

[49] The rules adopted herein will require applicants to demonstrate successful coordination with Federal government users prior to grant. And, as in the past, we will not issue licenses to parties who will not, in our opinion, be able to coordinate their systems with existing and authorized users.

[50] ITU Resolution No. 46 (WARC-92) (Res. 46) notes that "[a]ffected administrations, as well as the administration seeking coordination, shall make all possible mutual efforts to overcome the difficulties in a manner acceptable to the parties concerned." Res. 46, §2.8A.

[51] Or indeed, even prior to launch, as long as the licensee operates on a non-interference basis with authorized users. *See* International Radio Regulation 342.

[52] As set forth in ITU Resolution No. 46 (WARC-92).

ministrations, the efforts of these other jurisdictions to implement NVNG service within their own territories will remain within their control.[53]

29. *Distress and safety communications.* The Interagency Committee on Search and Rescue (ICSAR)[54] notes that NVNG offers the potential to greatly improve emergency communications to benefit search and rescue (SAR) and disaster response operations, and recommends that NVNG applications address certain SAR concerns. Specifically, ICSAR suggests that applicants in the NVNG MSS disclose how their systems will: (1) determine the grid coordinates of any distress signal received; (2) determine and direct messages to the appropriate search and rescue organization for assistance; and (3) design the communications interface with search and rescue organizations to utilize the public switched data network. In reply, STARSYS initially notes that the NVNG mobile-satellite service is not a designated safety service.[55] In light of this fact, the company suggests that the costly service options described by ICSAR should be undertaken voluntarily by the licensees only if a market for these services appears to exist. We agree with ICSAR that NVNG services have the potential to complement existing safety services.[56] We note, however, that the NVNG services are not intended to replace existing international safety services and cannot be used in lieu of distress beacons, such as emergency locator transmitters or emergency position indicating radio beacons, that are required to be carried by international agreement or statute.[57] We agree, therefore, with STARSYS that ICSAR's proposal to mandatorily require NVNG applicants to show specific methods of interconnection to route distress communications to SAR organizations is not necessary. System operators have adequate incentives to work to meet demands identified by ICSAR in a timely and cost-effective manner. We therefore do not believe that it is necessary to impose upon NVNG applicants the requirements suggested by ICSAR. We expect, however, that NVNG system operators who choose to offer distress communications capability will coordinate their efforts with ICSAR and SAR organizations.

30. *Public notice requirement.* The Commission has also proposed to modify its rules to specify that its public notice requirements do not apply to assignments or transfers of space station authorization that do not involve a substantial change of control. The only comments received regarding this proposal were favorable. Because this amendment merely codifies our existing practice, and will in no way adversely impact the public interest, we adopt section 25.151(c)(5) as proposed.

## III. FINAL REGULATORY FLEXIBILITY ANALYSIS

31. *Need for Rules and Objective.* We have codified proposed rules that will permit the licensing and regulation of new mobile-satellite systems. Our objectives have been to promote efficiency and innovation in the licensing and use of the electromagnetic spectrum, to develop competitive and innovative communications systems, and to promote effective and adaptive regulations.

32. *Issues Raised by the Public in Response to the Initial Analysis.* No comments were received specifically in response to the Initial Regulatory Flexibility Analysis. We have, however, taken into account all issues raised by the public in response to the proposed rules. In certain instances, we have eliminated or modified our proposed rules in response to those comments.

33. *Alternatives that Would Lessen Impact.* The minimal regulatory burden that we have imposed is necessary in order to carry out our duties under the Communications Act and other Federal statutes. We have modified a rule to require the annual, instead of semi-annual, submission of data, which will lessen the reporting burden on licensees. We will continue to examine these requirements in an effort to eliminate unnecessary regulations and to minimize significant economic impact on small businesses.

## IV. CONCLUSION AND ORDERING CLAUSES

34. By our action today, we are establishing licensing and operating procedures for the non-voice, non-geostationary mobile satellite service. This new satellite service will offer affordable and innovative communications options to the American public.

35. Accordingly, IT IS ORDERED that Parts 2 and 25 of the Commission's Rules are amended as specified in Appendix B, effective 30 days after publication in the Federal Register.

36. IT IS FURTHER ORDERED that the applicants will be given 90 days from the effective date of these regulations to file conforming amendments and all necessary fees.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[53] Other administrations will thus be assured "equitable and standard conditions of access" to meet their domestic needs, in accordance with ITU Resolution No. 70 (WARC-92).

[54] ICSAR is made up of representatives from seven Federal agencies, including the Federal Communications Commission. This Committee has search and rescue responsibilities under the United States National Search and Rescue Plan.

[55] Although not a designated safety service, NVNG system operators have certain obligations relating to maritime distress communications in accordance with 47 U.S.C. §§321 (b) and 359. *See* §25.142 (b) (4) adopted herein.

[56] Much like cellular radio, which in certain areas can be used to contact the U.S. Coast Guard by pressing *CG on the cellular phone.

[57] Compulsory equipment carriage requirements are established in portions of the Commission's Rules, as well as by statute. *See*, for example, 47 C.F.R. §§80.801 *et seq.*; Ch. IV, International Convention on the Safety of Life at Sea, 32 U.S.T. 47, T.I.A.S. 9700 (1974).

## APPENDIX A

**Comments Filed**

dbX Corporation
Interagency Committee on Search and Rescue
Leo One Corporation
Orbital Communications Corporation
Space Technology Services International
STARSYS Global Positioning, Inc.
Volunteers in Technical Assistance

**Reply Comments Filed**

dbX Corporation
Leo One Corporation
Orbital Communications Corporation
RadioMail Corporation
Space Technology Services International
STARSYS Global Positioning, Inc.
Volunteers in Technical Assistance

**Supplementary Comments Filed**

dbX Corporation
Orbital Communications Corporation
STARSYS Global Positioning, Inc.

**APPENDIX B Title 47 of the Code of Federal Regulations, Parts 2 and 25, are amended as follows:**

1. The authority citation for Part 2 continues to read as follows:

**AUTHORITY: Sec. 4, 302, 303 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 154(i), 302, 303, 303(r), and 307, unless otherwise noted.**

2. A new paragraph is added, in alphabetical order, to Sections 2.1 and 25.201 to read as follows:

*Non-Voice, Non-Geostationary Mobile-Satellite Service.* A mobile-satellite service reserved for use by non-geostationary satellites in the provision of non-voice communications which may include satellite links between land earth stations at fixed locations.

3. The Table of Contents for Part 25 is revised to read as follows:

## PART 25 - SATELLITE COMMUNICATIONS

### Subpart A - General

Sec.

25.101 Basis and scope.
25.102 Station authorization required.
25.103 Definitions.
25.104 Preemption of local zoning of earth stations.
25.105 - 25.108 [Reserved]
25.109 Cross-reference.

### Subpart B - Applications and Licenses

25.110 Filing of applications, fees, and number of copies.
25.111 Additional information.
25.112 Defective applications.
25.113 Construction permits.
25.114 Applications for space station authorizations.
25.115 Applications for earth station authorizations.
25.116 Amendments to applications.
25.117 Modification of station license.
25.118 Assignment or transfer of control of station authorization.
25.119 Application for special temporary authorization.
25.120 License term and renewals.

### EARTH STATIONS

25.130 Filing requirements for transmitting earth stations.
25.131 Filing requirements for receive-only earth stations.
25.132 Verification of earth station antenna performance standards.
25.133 Period of construction; certification of commencement of operation.
25.134 Licensing provisions of very small aperture terminal (VSAT) networks.
25.135 Licensing provisions for earth station networks in the non-voice, non-geostationary mobile-satellite service.

### SPACE STATIONS

25.140 Qualifications of domestic fixed-satellite space station licensees.
25.141 Licensing provisions for the radiodetermination satellite service.
25.142 Licensing provisions for the non-voice, non-geostationary mobile-satellite service.

**PROCESSING OF APPLICATIONS**

25.150 Receipt of Applications.

25.151 Public notice period.

25.152 Dismissal and return of applications.

25.153 Repetitious applications.

25.154 Opposition to applications and other pleadings.

25.155 Mutually exclusive applications.

25.156 Consideration of applications.

**FORFEITURE, TERMINATION, AND REINSTATEMENT OF STATION AUTHORIZATION**

25.160 Administrative sanctions.

25.161 Automatic termination of station authorization.

25.162 Cause for termination of interference protection.

25.163 Reinstatement.

**Subpart C - Technical Standards**

25.201 Definitions.

25.202 Frequencies, frequency tolerance and emission limitations.

25.203 Choice of sites and frequencies.

25.204 Power limits.

25.205 Minimum angle of antenna elevation.

25.206 Station identification.

25.207 Cessation of emissions.

25.208 Power flux density limits.

25.209 Antenna performance standards.

25.210 Technical requirements for space stations in the Fixed-Satellite Service

25.211 Video transmissions in the Domestic Fixed-Satellite Service.

25.212 Narrowband transmissions in the Fixed-Satellite Service.

25.251 Special requirements for coordination.

25.252 Maximum permissible interference power.

25.253 Determination of coordination distance for near great circle propagation mechanisms.

25.254 Computation of coordination distance contours for propagation modes associated with precipitation scatter.

25.255 Guidelines for performing interference analyses for near great circle propagation mechanisms.

25.256 Guidelines for performing interference analyses for precipitation scatter modes.

**Subpart D -- Technical Operations**

25.271 Control of transmitting stations.

25.272 General inter-system coordination procedures.

25.273 Duties regarding space communications transmissions.

25.274 Procedures to be followed in the event of interference.

25.275 Particulars of operation.

25.276 Points of communication.

25.277 Temporary fixed earth station operations.

**Subpart E - Developmental Operations**

25.300 Developmental operation.

25.308 Automatic Transmitter Identification System (ATIS)

**Subparts F - G -- [Reserved]**

**Subpart H - Authorization To Own Stock in the Communications Satellite Corporation**

25.501 Scope of this subpart.

25.502 Definitions.

25.503 - 25.504 [Reserved]

25.505 Persons requiring authorization.

25.506 - 25.514 [Reserved]

25.515 Method of securing authorization.

25.516 - 25.519 [Reserved]

25.520 Contents of application.

25.521 Who may sign applications.

25.522 Full disclosures.

25.523 Form of application, number of copies, fees, etc.

25.524 [Reserved]

25.525 Action upon applications.

25.526 Amendments.

25.527 Defective applications.

25.528 - 25.529 [Reserved]

25.530 Scope of authorization.

25.531 Revocation of authorization.

4. The authority citation for Part 25 continues to read as follows:

**AUTHORITY: Sections 101 - 404, 76 Stat. 419 - 427; 47 U.S.C. 701 - 744, Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interprets or applies sec. 303, 48 Stat. 1082, as amended; 47 U.S.C. 303.**

5. Section 25.114 is amended by revising paragraph (c)(18), and adding a new paragraph (c)(27), to read as follows:

**§ 25.114. Applications for space station authorizations.**

***************

(c) * * * *

(18) Detailed information demonstrating the financial qualifications of the applicant to construct and launch the proposed satellites. Applications for domestic, and NVNG MSS, satellite systems shall provide the financial information required by § 25.140(b)-(e) or § 25.142(a)(4). Applications for international satellite systems authorized pursuant to Establishing of Satellite Systems Providing International Communications, 50 FR 42266 (October 18, 1985), 101 FCC 2d 1046 (1985), *recon.* 61 RR2d 649 (1986), *further recon.* 1 FCC Rcd 439 (1986), shall provide the information required by that decision.

* * * *

(27) Applications to license multiple space station systems in the non-voice, non-geostationary mobile-satellite service under blanket operating authority shall also provide all information specified in § 25.142.

6. Section 25.115 is amended by adding new a paragraph (d) to read as follows:

**§ 25.115 Applications for earth station authorizations.**

***************

(d) User transceivers in the non-voice, non-geostationary mobile-satellite service need not be individually licensed. Service vendors may file blanket applications for transceiver units using FCC Form 493 and specifying the number of units to be covered by the blanket license. FCC Form 430 should be submitted if not already on file in conjunction with other facilities licensed under this subpart. Each application for a blanket license under this section shall include the information described in § 25.135.

7. Section 25.120 is amended by revising paragraphs (d) and (e) to read as follows:

**§ 25.120 License term and renewals.**

***************

(d) Space stations.

(1) For space stations in the fixed-satellite services, the license term will begin at 3 a.m. EST on the date the licensee certifies to the Commission that the satellite has been successfully placed into orbit and that the operations of the satellite fully conform to the terms and conditions of the space station radio authorization.

(2) For space station systems in the non-voice, non-geostationary mobile-satellite service, the license term will begin at 3 a.m. EST on the date that the licensee certifies to the Commission that its initial space station has been successfully placed into orbit and that the operations of that satellite fully conform to the terms and conditions of the space station system authorization. All space stations launched and brought into service during the ten-year license term shall operate pursuant to the system authorization, and the operating authority for all space stations will terminate upon the expiration of the system license.

(e) Renewal of licenses. Applications for renewals of earth station license must be submitted on FCC Form 405 (Application for Renewal of Radio Station License in Specified Services) no earlier than 90 days and no later than 30 days, before the expiration date of the license. Applications for space station system replacement authorization in the non-voice, non-geostationary mobile-satellite service shall be filed no earlier than 90 days and no later than 30 days, prior to the end of the seventh year of the existing system license.

8. Section 25.130 is amended by revising paragraph (b) to read as follows:

**§ 25.130 Filing requirements for transmitting earth stations.**

***************

(b) A frequency coordination analysis in accordance with § 25.203 shall be provided for earth stations transmitting in the frequency bands shared with equal rights between terrestrial and space services, except that transceiver units associated with the non-voice, non-geostationary mobile-satellite service shall instead provide the information required by § 25.135.

* * * *

9. Section 25.133 is amended by revising paragraph (b) to read as follows:

**§ 25.133 Period of construction; certification of commencement of operation.**

****************

(b) Each license for a transmitting earth station included in this part shall also specify as a condition therein that upon the completion of construction, each licensee must file with the Commission a certification containing the following information: The name of the licensee, file number of the application, call sign of the antenna, date of the license, a certification that the facility as authorized has been completed, that each antenna facility has been tested and is within 2 dB of the pattern specified in § 25.209, and that the station is operational including the date of commencement of service, and will remain operational during the license period unless the license is submitted for cancellation. For stations authorized under § 25.115(c) and (d) of this part (Large Networks of Small Antennas operating in the 12/14 GHz bands: User transceivers in the non-voice, non-geostationary mobile-satellite service), a certificate must be filed when the network is put into operation.

10. A new section 25.135 is added to read as follows:

**§ 25.135 Licensing provisions for earth station networks in the non-voice, non-geostationary mobile-satellite service.**

(a) Each applicant for a blanket earth station license in the non-voice, non-geostationary mobile-satellite service shall demonstrate that transceiver operations will not cause unacceptable interference to other authorized users of the spectrum, based on existing system information publicly available at the Commission at the time of filing, and will comply with operational conditions placed upon the systems with which they are to operate in accordance with Section 25.142(b). This demonstration shall include a showing as to all the technical parameters, including duty cycle and power limits, under which the individual user transceivers will operate.

(b) Transceiver units associated with the non-voice, non-geostationary mobile-satellite service may not be operated on civil aircraft. All portable or hand-held transceiver units (including transceiver units installed in other devices that are themselves portable or handheld) having a receiver operating in the 137-138 MHz band shall bear the following statement in a conspicuous location on the device: "This device may not be operated while on board a civil aircraft. It must be turned off at all times while on board such an aircraft." This subsection shall not apply to transceiver units whose receivers are incapable of radiating in the 108-137 MHz frequency bands.

(c) Transceiver units in this service are authorized to Ncommunicate with and through U.S. authorized space stations Fonly. No person shall transmit to a space station unless the specific transmission is first authorized by the space station licensee or by a service vendor authorized by that licensee.

(d) Any transceiver unit associated with this service will be Tdeemed, when communicating with a particular non-voice, Fnon-geostationary mobile-satellite service system pursuant to paragraph (c) of this section, to be temporarily associated with and licensed to the system operator or service vendor holding the blanket earth station license awarded pursuant to Section 25.115(d). The domestic earth station licensee shall, for such temporary period, assume the same licensee responsibility for such transceiver as if such transceiver Qwere regularly licensed to it.

11. Section 25.140 is amended by renumbering existing paragraph (d)(2)(iii) as (d)(2)(iv), and by adding a new paragraph (d)(2)(iii) to read as follows:

**§ 25.140 Qualifications of domestic fixed-satellite space station licensees.**

****************

(d) * * * *

(2) * * * *

(iii) The terms of any grant, or other external funding commitment intended to be used to finance the proposed (9 construction, acquisition or operation of the requested facilities including such information as the identity of the grantor(s), the amount committed, letters of commitment, and detailed terms of the transaction, including the details of any contingencies;

(iv) Any financing arrangements contingent on further performance by either party, such as marketing of satellite capacity or raising additional financing, will not satisfy the requirements of paragraph (c) of this section.

12. A new Section 25.142 is added to read as follows:

**§ 25.142 Licensing provisions for the non-voice, non-geostationary mobile-satellite service.**

(a) Space station application requirements.

(1) Each application for a space station system authorization in the non-voice, non-geostationary mobile-satellite service shall describe in detail the proposed non-voice, non-geostationary mobile-satellite system, setting forth all pertinent technical and operational aspects of the system, and the technical, legal, and financial qualifications of the applicant. In particular, each application shall include the information specified in Section 25.114, except that in lieu of the information concerning orbital locations requested in Section 25.114(c)(6), the applicant shall specify the number of space stations and applicable information relating to the altitude(s), argument(s) of perigee, service arc(s), right ascension of ascending node(s), eccentricity, and inclination of the space stations (all referenced to the same time) that will comprise its system. Applicants must also file information demonstrating compliance with all requirements of this section, and showing, based on existing system information publicly available at the Commission at the time of filing, that they will not cause

unacceptable interference to any non-voice, non-geostationary mobile-satellite service system authorized to construct or operate.

(2) Applicants for a non-voice, non-geostationary mobile-satellite must identify the power flux density produced at the Earth's surface by each space station of their system in the frequency bands 137-138 MHz and 400.15-401 MHz, to allow determination of whether coordination with terrestrial services is required under international footnotes 599A and 647B of Section 2.106 of the Commission's Rules. In addition, applicants must identify the measures they would employ to protect the radio astronomy service in the 150.05-153 MHz and 406.1-410 MHz bands from harmful interference from unwanted emissions.

(3) Emission limitations.

(i) Applicants in the non-voice, non-geostationary mobile-satellite service shall show that their space stations will not exceed the emission limitations of paragraphs (f)(1), (2), and (3) of Section 25.202, as calculated for a fixed point on the Earth's surface in the plane of the space station's orbit, considering the worst-case frequency tolerance of all frequency determining components, and maximum positive and negative Doppler shift of both the uplink and downlink signals, taking into account the system design.

(ii) Applicants in the non-voice, non-geostationary mobile-satellite service shall show that no signal received by their satellites from sources outside of their system shall be retransmitted with a power flux density level, in the worst 4 kHz, higher than the level described by the applicants in paragraph (a)(2) of this section.

(4) Financial qualifications. Each applicant for space station system authorization in the non-voice, non-geostationary mobile-satellite service must demonstrate, on the basis of the documentation contained in its application, that it is financially qualified to proceed expeditiously with the construction, launch and operation for one year of the first two space stations of its proposed system immediately upon grant of the requested authorization. Failure to make such a showing will result in the dismissal of the application. This showing shall include all information described in § 25.140(c), (d) and (e).

(5) Replacement of space stations within the system license term. The licensee need not file separate applications to construct, launch and operate technically identical replacement satellites within the term of the system authorization. However, the licensee shall certify to the Commission, at least thirty days prior to launch of such replacement(s) that:

(i) the licensee intends to launch a space station that is technically identical to those authorized in its system license, and

(ii) launch of this space station will not cause the licensee to exceed the total number of operating space stations authorized by the Commission.

(b) Operating conditions. In order to ensure compatible operations with authorized users in the frequency bands to be utilized for operations in the non-voice, non-geostationary mobile-satellite service, non-voice, non-geostationary mobile-satellite service systems must operate in accordance with the conditions specified in this section.

(1) Service limitation. Voice services may not be provided.

(2) Coordination requirements with Federal government users.

(i) The frequency bands allocated for use by the non-voice, non-geostationary mobile-satellite service are MMalso authorized for use by agencies of the Federal AAgovernment. The Federal use of frequencies in the non-voice, non-geostationary mobile-satellite service frequency bands is under the regulatory jurisdiction of the National Telecommunications and Information Administration (NTIA).

(ii) The Commission will use its existing procedures for liaison with NTIA to reach agreement with respect to achieving compatible operations between Federal government users under the jurisdiction of NTIA and non-voice, non-geostationary mobile-satellite service systems (including user transceivers subject to blanket licensing under Section 25.115(d)) through the frequency assignment and coordination practices established by NTIA and the Interdepartment Radio Advisory Committee (IRAC). In order to facilitate such frequency assignment and coordination, applicants shall provide the Commission with sufficient information to evaluate electromagnetic compatibility with the Federal government use of the spectrum, and any additional information requested by the Commission. As part of the coordination process, applicants shall show that they will not cause unacceptable interference to authorized Federal government users, based upon existing system information provided by the Government. The frequency assignment and coordination of the satellite system with Federal government users shall be completed prior to grant of construction authorization.

(iii) The Commission shall also coordinate with NTIA/IRAC with regard to the frequencies to be shared by those earth stations of non-voice, non-geostationary mobile-satellite service systems that are not subject to blanket licensing under Section 25.115(d), and authorized Federal government stations in the fixed and mobile services, through the exchange of appropriate systems information.

(3) Coordination among non-voice, non-geostationary mobile-satellite service systems. Applicants for authority to establish non-voice, non-geostationary mobile-satellite service systems are encouraged to coordinate their proposed frequency usage with existing permittees and licensees in the non-voice, non-geostationary mobile-satellite service whose facilities could be affected by the new proposal in terms of frequency interference or restricted system capacity. All affected applicants, permittees, and licensees shall, at the direction of the Commission, cooperate fully and make every reasonable effort to resolve technical problems and conflicts that may inhibit effective and efficient use of the radio spectrum; however, the permittee or licensee being coordinated

with is not obligated to suggest changes or re-engineer an applicant's proposal in cases involving conflicts.

(4) Safety and distress communications. Stations operating in the non-voice, non-geostationary mobile-satellite service that are used to comply with any statutory or regulatory equipment carriage requirements may also be subject to the provisions of Sections 321(b) and 359 of the Communications Act of 1934, as amended. Licensees are advised that these provisions give priority to radio communications or signals relating to ships in distress and prohibit a charge for the transmission of maritime distress calls and related traffic.

(c) Reporting requirements. All operators of non-voice, non-geostationary mobile-satellite service systems shall, on June 30 of each year, file a report with the Common Carrier Bureau and the Commission's Laurel, Maryland field office containing the following information:

(1) A listing of any non-scheduled space station outages for more than thirty minutes and the cause(s) of such outages;

(2) A detailed description of the utilization made of the in-orbit satellite system. That description should identify the percentage of time that the system is actually used for domestic transmission, the amount of capacity (if any) sold but not in service, and the amount of unused system capacity; and

(3) Identification of any space stations not available for service or otherwise not performing to specifications, the cause(s) of these difficulties, and the date any space station was taken out of service or the malfunction identified.

13. Section 25.151 is amended by revising paragraph (c)(5) to read as follows:

**§ 25.151 Public notice period.**

**********

(c) * * * *

(5) For consent to an assignment or transfer of control of a space station authorization or a transmitting earth station authorization, where the assignment or transfer does not involve a substantial change in ownership or control; or

14. Section 25.202 is amended by adding a new paragraph (a)(3), and by revising paragraph (f)(4), to read as follows:

**§ 25.202. Frequencies, frequency tolerance and emission limitations.**

**********

(a) * * * *

(3) The following frequencies are available for use by the non-voice, non-geostationary mobile-satellite service:

| | |
|---|---|
| 137-138 MHz: | space-to-Earth |
| 148-149.9 MHz: | Earth-to-space |
| 149.9-150.05 MHz: | Earth-to-space |
| 399.9-400.05 MHz: | Earth-to-space |
| 400.15-401 MHz: | space-to-Earth |

Until January 1, 1997, the allocations in the 149.9-150.05 MHz and 399.9-400.05 MHz bands may be used on a secondary basis only. Since the 399.9-400.05 MHz band is not allocated internationally to the mobile-satellite service, all operations outside the United States will be on a non-interference basis only. * * * *

(f) * * * *

(4) In any event, when an emission outside of the authorized bandwidth causes harmful interference, the Commission may, at its discretion, require greater attenuation than specified in paragraphs (f)(1), (2) and (3) of this section.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: December 1, 1993**

**Four Local Exchange Carriers File Petitions for Exemption from the Commission's Physical Collocation Requirement (CC Docket No. 91-141, Transport Phase I)**

**Pleading Cycle Established**

**COMMENTS DUE: December 16, 1993**
**REPLIES DUE: January 4, 1994**

On November 18, 1993, four local exchange carriers (LECs) filed petitions for exemption from the Commission's requirement to file physical collocation tariffs for switched transport service. These LECs are BellSouth Telecommunications, Inc. (BellSouth), GTE Service Corporation (GTE), Southern New England Telephone Company (SNET), and Southwestern Bell Telephone Company (Southwestern Bell). The petitioners contend generally that they lack sufficient space at certain specified central offices to provide physical collocation for switched transport expanded interconnection.

Interested parties filing comments or oppositions to any of these petitions are invited to do so no later than **December 16, 1993**. Parties filing replies may do so no later than **January 4, 1994**. An original and five copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial copying firm, International Transcription Service, Suite 140, 2100 M Street, N.W., Washington, D.C. 20037. Also, one copy shall be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Copies of these petitions and other related documents may be obtained from International Transcription Service. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Steven Spaeth, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

US West Communications
Southern New England Telephone
Company

Zone Density Pricing Plans

**ORDER**

**Adopted: November 30, 1993; Released: November 30, 1993**

By the Acting Chief, Common Carrier Bureau:

## I. INTRODUCTION

1. By this Order, we approve the zone density pricing plans filed by US West, Inc. (US West) and Southern New England Telephone Company (SNET). As discussed further below, we find that the plans, as supplemented, reasonably implement the density pricing authorized by the Commission in the *Special Access Order*.[1] Accordingly, US West and SNET may now file tariff revisions, to be effective on not less than 31 days' notice, to implement their zone density pricing plans.[2]

## II. BACKGROUND

### A. Commission Requirements

2. In the *Special Access Order*, the Commission granted all Tier 1 local exchange carriers (LECs) implementing special access expanded interconnection additional pricing flexibility in order to bring their special access rates more in line with their costs.[3] To implement this additional pricing flexibility, the Commission permitted each affected LEC to establish, subject to Commission approval, zones within each study area and required each central office to be assigned to one of the zones. Once plans are approved, LECs may file tariffs establishing different rates in each zone. The Commission required the LECs to show they assigned each central office to a zone using criteria reflecting cost-related characteristics, although geographic contiguity could, under certain conditions, be a secondary, less important consideration.[4] The Common Carrier Bureau has previously approved zone density plans filed by eleven LECs.[5] In this order, we approve the plans, as amended, filed by US West and SNET.

### B. The Zone Density Plans

US West

3. US West states that it will implement three zones based on the density and traffic concentration of access demand within the US West region.[6] US West maintains that it has chosen to use total interstate traffic to set zone boundaries. Specifically, US West states that it used Million Minutes of Use per Square Mile (MMOU/SM) to establish a density continuum.[7]

4. In addition, US West followed a three step procedure to develop its zone plan. First, DS1 and DS3 channel terminations were converted to voice grade equivalent channel terminations. Second, US West converted voice grade equivalent channel termination demand to MOU demand by applying a conversion rate of MOU per month to each. Third, US West took the MOUs for switched access for each wire center for twelve months and added it to the calculated twelve month MOU equivalent for DS1 and DS3 service to produce a total MOU figure per wire center. Finally, to reflect the relative density of each wire center, the MOU per wire center is divided by the square miles served by that wire center.[8] US West also claims that it established the three zones so that each one represents approximately equal amounts of DS1, DS3 and switched access demand for the region. US West also moved one office from zone three to zone two in three states so that no study area would have only zone three offices.

SNET

5. SNET proposes to classify each of its offices into one of three zones based primarily on combined interstate traffic for Switched and Special Access services. According to

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[1] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, and Amendment of the Part 69 Allocation of General Support Facility Costs, CC Docket No. 92-222, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) (*Special Access Order), recon.*, 8 FCC Rcd 127 (1992), *appeal pending sub nom. Bell Atlantic Corp. v. FCC*, No. 92-1619 (D.C. Cir., filed Nov. 25, 1992); *Second Memorandum Opinion and Order on Reconsideration*, CC Docket No. 91-141, 8 FCC Rcd 7341 (1993).

[2] On March 23, 1993, MFS Communications Company, Inc. (MFS) filed an Emergency Petition to Hold Proceedings in Abeyance. On June 21, it filed a Supplemental Petition. In those petitions, MFS seeks deferral of the approval of the LEC's zone density plans until the Common Carrier Bureau completes its inquiry into the reasonableness of LEC special access volume and term discounts. The Bureau denied the MFS Petition insofar as it related to the zone plans approved in the Order. *See First Density Zone Order*, 8 FCC Rcd at 4448 and n.15.

[3] *See Special Access Order*, 7 FCC Rcd at 7373 and 7454 n.411.

[4] *See* Section 61.38(b)(4) of the Commission's Rules, 47 C.F.R. § 61.38(b)(4); *see also Special Access Order*, 7 FCC Rcd at 7455 and n.415.

[5] *See* BellSouth Telecommunications, Inc., GTE Service Corporation, Lincoln Telephone and Telegraph Co., NYNEX Telephone Companies, Pacific Bell, and Rochester Telephone Corporation Zone Density Pricing Plans, 8 FCC Rcd 4443 (Com. Car. Bur. 1993)( *First Zone Density Order); see also* Bell Atlantic Telephone Companies, Centel Telephone Company, Southwestern Bell Telephone Company, United Telephone Companies Zone Density Pricing Plans, 8 FCC Rcd 5529 (Com. Car. Bur. 1993)( *Bell Atlantic);* Ameritech Operating Companies, DA 93-1276, released Sept. 28, (*Ameritech).*

[6] US West Zone Density Plan at 2.

[7] The MMOU/SM data are masked by dividing them by an arbitrary number in order to protect wire center information that US West believes to be confidential. *Id.*

[8] *Id.* at 2-4.

SNET, except for four wire centers, its wire centers were assigned to one of three zones based on their total equivalent MOU.[9] The four wire centers not so assigned were reassigned from Zone 3 to Zone 2 based on their geographic contiguity. In order to classify its offices into zones, SNET first identified actual switched access MOU quantities in each office based on a recent representative month's data (November 1992) from SNET's Carrier Access Billing System. SNET states that total quantities of DS1 and DS3 circuits in each office were also identified, and to avoid double counting, all special access DS1 circuits riding on special access DS3 circuits were quantified and backed out of this total calculation. SNET then converted its DS1 and DS3 circuits to equivalent minutes of use, or equivalent MOUs, by first converting the circuits to an equivalent DS0 (voice grade) level and assuming 9,000 monthly MOU per DS0 circuit.

6. Next, SNET states that special access equivalent minutes of use were added to the switched access minutes to obtain total equivalent MOU for each office. SNET then ranked all its wire centers in its study area by traffic density from highest to lowest, according to total equivalent MOU and established logical MOU breakpoints for each density zone. In order to confirm the office ranking, SNET considered other factors such as total business and residence access lines, access line growth, and communities of interest. Based on this total assessment, SNET assigned each office to one of the three zones.[10]

## III. DISCUSSION

7. On March 26, 1993, six parties[11] filed comments concerning US West and SNET's zone plans. The commenters challenged the US West and SNET plans in part on broad bases that apply to several plans approved earlier. These more general issues were addressed and resolved in the *First Zone Density Order, supra*. We are incorporating by reference our previous discussions of those generic issues in this Order.[12]

8. We have reviewed the oppositions to these plans, and the replies of US West and SNET. We agree with US West's contention that the commenters raise issues that relate more to their dissatisfaction with the Commission's *Expanded Interconnection Order*, rather than to the specifics of US West's zone density plan. SNET observes that the commenters were primarily concerned with the question of whether the LECs provided sufficient cost-related criteria to support their zone plans. We conclude that US West and SNET's zone plans reflect cost-related characteristics based on traffic density, as the Commission intended in the *Special Access Order*. Accordingly, we approve the US West and SNET plans and these carriers may proceed to file tariffs implementing their zone density plans on 31 days' notice.

9. Ad Hoc, WilTel and Teleport Denver[13] assert that US West's zone density plan does not contain sufficient cost support data. For example, Teleport Denver asserts that US West makes no showing that the assignment of its central offices to the three zones reflects cost characteristics. US West contends that the Commission did not require the LECs to provide cost support data for their zone density plans, but rather the LECs must show "that the assignment of central offices to each of the zones reflects cost-related characteristics, such as traffic density or some measure of traffic through each office".[14] US West maintains that its zone density plan meets the Commission's requirements because it contains an assignment of central offices to zones on the basis of MOU per square mile, a measure of density.

10. A number of commenters objected to US West's use of MOU per square mile as a measure of traffic density to assign central offices to one of three zones. For example, WilTel argues that if traffic density is to be the basis for zones, total traffic must be used to calculate density. CompTel, however, supports US West's method of measuring traffic density by dividing traffic volumes by the geographic area served by the wire center.[15] In response, US West states that while commenters might prefer a standardized methodology for calculating traffic density and assigning central offices, the Commission did not adopt such an approach in its *Expanded Interconnection Order*. US West maintains that its use of MOU per square mile is an acceptable means of measuring traffic density and should be approved.

11. The density per square mile measurement approach has been approved previously.[16] For the same reasons advanced in *Ameritech Operating Companies*, we approve the density per square mile approach employed by US West.

SNET

12. Several parties questioned SNET's methodology for developing its zone plan, asserting that they cannot determine whether SNET used the additional factors it claims to have considered, such as total business and residence access lines, access line growth, and communities of interest, to assign offices to zones other than the ones in which they would have been placed using traffic density alone.[17]

13. SNET states that it has appropriately assigned its central offices to Zone 1 and Zone 2. SNET further states that it reviewed other factors to confirm office rankings and made no changes to central office assignments based upon this review.[18] On May 24, 1993, SNET supplied the Bureau with a listing of the DS1 equivalents for each of its offices and the offices' assignment to zones. These data show that all offices were assigned consistently with their position in SNET's ranking order based on volume, other than four offices specifically identified by SNET in its filing.

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[9] SNET Zone Density Plan at 1.

[10] *Id.* at 2.

[11] Commenters specifically protesting the US West's plan are Ad Hoc Telecommunications Committee (Ad Hoc), Competitive Telecommunications Association (CompTel), MCI Communications Corporation (MCI), MFS Communications Company, Inc. (MFS), TDL Denver, and WilTel, Inc. (WilTel). CompTel, MCI and MFS commented on SNET's plan.

[12] *First Zone Density Order*, 8 FCC Rcd at 4445-6; *Bell Atlantic*, 8 FCC Rcd at 5530; *Ameritech*, DA 93-1276 at para. 6.

[13] Ad Hoc Comments at 9; WilTel Comments at 8 n.10; Teleport Denver Comments at 3.

[14] *Expanded Interconnection Order*, 7 FCC Rcd at 7454-55.

[15] CompTel Comments at 5.

[16] *Ameritech Operating Companies, supra*, at para. 10.

[17] MFS Comments at 12-14; MCI Comments at 7 n.10

[18] SNET Reply at 3.

14. We have carefully scrutinized SNET's reclassification of four offices based on contiguity or community of interest. Our review has included an examination of a map provided by SNET which shows the locations of the four reassigned offices and their relationship to other offices. Those four offices were assigned higher density zones -- from zone three to zone two -- and share a community of interest with a contiguous zone two office. We conclude that SNET's reassignments of the offices are clear examples of proper office reassignments for contiguity reasons and the reassignments comply with the requirements of the *Expanded Interconnection Order*.

## IV. CONCLUSION

15. We have reviewed US West's the zone density pricing plan as supplemented, SNET's zone density pricing plan, the comments thereon, and the replies, filed in this proceeding. We find that the plans filed by US West and SNET reasonably implement the zone density pricing scheme envisioned by the Commission in the *Special Access Order*. We therefore approve the plans filed by US West and SNET.

## V. ORDERING CLAUSES

16. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act, 47 U.S.C.§ 154(i), Section 0.91 of the Commission's Rules, 47 CFR § 0.91, and Section 0.291 of the Commission's Rules, 47 CFR § 0.291, the zone density pricing plans filed by US West Communications and Southern New England Telephone Company ARE APPROVED.

17. IT IS FURTHER ORDERED that the Emergency Petition to Hold Proceedings in Abeyance, and the Supplemental Petition, filed by MFS Communi-cations Company, ARE DENIED to the extent they relate to the plans approved by this Order.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-242**

In the Matter of

DAVID & SHERRY PIKE

Licensees of Station KRAN(AM)
Morton, Texas

Order to Show Cause Why the
License for KRAN(AM)
Morton, Texas, Should
Not be Revoked

**ORDER**

**Adopted: November 29 1993; Released: December 7, 1993**

By the Chief, Mass Media Bureau:

1. This proceeding began on August 31, 1993, when the Commission released its *Order to Show Cause and Hearing Designation Order*, 8 FCC Rcd 6298 (1993) ("*Show Cause Order*"). The Commission ordered David & Sherry Pike ("Pike") to show cause why the license for Station KRAN(AM), Morton, Texas, should not be revoked.[1]

2. The *Show Cause Order* specified issues to determine whether Pike has the capability and intent to expeditiously resume broadcast operations of KRAN(AM); to determine whether Pike has violated Section 73.1740 (Minimum Operating Schedule) and/or 73.1750 (Discontinuance of Operation) of the Commission's Rules; and to determine, based on the evidence adduced pursuant to the foregoing issues, whether Pike is qualified to remain the licensee of KRAN(AM).

3. By *Memorandum Opinion and Order*, FCC 93M-677, released October 27, 1993, Presiding Administrative Law Judge Joseph P. Gonzalez terminated the hearing proceeding because Pike failed to file a notice of appearance. Pursuant to Section 1.92(c) of the Commission's Rules, the Presiding Judge certified the case to the Commission.

4. KRAN(AM) has been off the air without authority since July 10, 1992. Although Pike subsequently requested additional time to remain silent in order to sell the station, that request was ultimately dismissed because Pike twice failed to respond to Commission requests for an Anti-Drug Abuse Act certification.[2] Pike also failed to provide information requested by the Commission regarding the station's current silence. Further, no assignment application has ever been filed.

5. In light of the foregoing, it is concluded that KRAN(AM) is currently off the air without authority. Furthermore, since Pike has not demonstrated any progress in returning KRAN(AM) to on-air status and has not surrendered its license, it is concluded that Pike has violated Sections 73.1740 and 73.1750 of the Commission's Rules. It is further concluded that Pike is not qualified to remain the licensee of Station KRAN(AM).

6. Accordingly, IT IS ORDERED That the license of David & Sherry Pike for Station KRAN(AM), Morton, Texas, IS REVOKED.[3]

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] Although the Commission included a *Notice of Apparent Liability* for willful or repeated violations of Commission rules, no forfeiture is being imposed because of the action taken herein.

[2] *See, In the Matter of Amendment of Part I of the Commission's Rules to Implement Section 5301 of the Anti Drug Abuse Act of 1988*, 6 FCC Rcd 7551 (1991).

[3] The Mass Media Bureau has been delegated authority to issue revocation orders in silent station cases. *See, Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Liability of
Weston Properties XVIII
Limited Partnership
Licensee, Radio Station WKBR(AM)
Wellesley, MA 02181

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 29, 1993; Released: December 7, 1993**

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration: (1) a Notice of Apparent Liability (NAL), 8 FCC Rcd 1783 (1993), imposing a forfeiture of eight thousand dollars ($8,000) on Weston Properties XVIII Limited Partnership (Weston), licensee of radio station WKBR(AM), Wellesley, MA., for willful violation of Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3540(a) of the Commission's Rules; and (2) a response to the NAL filed April 8, 1993, by Weston.

2. Weston does not contest the Commission's determination in the NAL that there was an unauthorized transfer of control of the station, but submits that its financial condition warrants a reduction of the forfeiture. Weston states that it is a matter of public record that it purchased the station in 1987 for approximately $1.4 million. The Commission recently granted Weston's application to assign the license for the station to Robert Miles Bittner for a purchase price of $40,000 (FCC File No. BAL-921030 EI), for a loss on its investment of $1,360,000.[1] Weston claims that during the period that it owned and operated the station, it lost approximately $2,211,478 and was not able to meet its obligations to creditors or service providers.

3. In support of its request for reduction of the forfeiture, Weston furnishes copies of its financial statements and Accountants' Review Reports for the years ended December 31, 1990, the last full year that the station was in operation, and December 31, 1989, December 31, 1988, and December 31, 1987.[2] Weston's December 31, 1990, financial statement shows a net loss of $388,787. WKBR(AM) went off the air for financial reasons on January 14, 1991. On September 21, 1991, the station returned to the air as a result of a "Management Agreement" with Brian Dodge, which expired on January 20, 1992. The "Management Agreement" required Brian Dodge to pay Weston $1,275 per month as long as it was in effect. The station continued on the air until March 1992, when it discontinued operations. According to Weston, since the station was off the air for most of 1991 and 1992, it did not submit any financial data for those years because it did not have any cognizable operational profits or losses. In sum, Weston claims that it has lost all of its investment in station WKBR(AM), noting that the proceeds of the assignment of the station are to be used to repay creditors. Accordingly, Weston requests that its NAL for a forfeiture of $8,000 be reduced.

4. According to Section 503(b)(2)(D) of the Communications Act, the licensee's ability to pay may be properly considered in mitigation of a forfeiture. Section 1.80(f)(3) of our Rules provides that "[a]ny showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." The attachment to the NAL indicates, if the licensee is claiming financial inability to pay, it is directed to furnish data to support the claim, which must contain (but is not limited to) a profit and loss statement containing data no older than one year from the date of the response and prepared under generally accepted accounting principles. As the NAL attachment also indicates, the profit and loss statement must include income and expenses from broadcast or cable operations (including noncash expenses such as amortization and depreciation), payments to principals (including salaries, commissions, management fees, interest, rents, etc.).

5. We note that the data in Weston's financial showing is more than one year old and that it was not prepared under generally accepted accounting principles. Specifically, the most recent data is for the period ending December 30, 1990. Additionally, the CPA who prepared the Accountants' Review Report of Weston's financial statements for 1990 and 1989, states that the review "is substantially less in scope than an examination in accordance with general accepted auditing standards ..." and the financial statements "are not intended to be presented in conformity with generally accepted accounting principles." Cover letter of Sullivan & Associates, P.C., Certified Public Accountants, dated February 20, 1991. Moreover, no affidavits are provided. Accordingly, Weston's financial documentation fails to meet the requirements set forth in the attachment to the NAL.

6. Section 1.80(b)(4) of our Rules states that, in determining the amount of the forfeiture, the Commission must consider "the nature, circumstances, extent and gravity of the violations and, with respect to a violator, the degree of culpability, any history of prior offenses, ability to pay and such other matters as justice may require." This rule requirement is reflected in the Commission's policy guidelines for the assessment of forfeitures. *See Policy Statement, Standards for Assessing Forfeitures* , 6 FCC Rcd 4695 (1991), *modified in part on reconsideration,* 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC,* No. 92-1321 (D.C. Cir. filed July 30, 1992).

[1] The assignment of license was consummated on April 6, 1993. According to Weston, the purchase price will be used to pay its creditors.

[2] The Accountants' Review Reports combine the years 1990 and 1989, and the years 1988 and 1987.

7. There is no dispute in this case that a forfeiture is proper. Weston's disagreement is solely as to the amount. In initially assessing the forfeiture, we took into consideration as a downward adjustment factor, the fact that Weston exhibited good faith in reporting the existence of the "Management Agreement" to the Commission as required by our rules. In its response to the NAL, Weston submits that its financial condition warrants a further reduction of the forfeiture. However, Weston's financial showing is not timely and was not prepared under generally accepted accounting principles nor in compliance with the attachment to the NAL. Moreover, even based on Weston's noncompliant documentation, it appears that Weston has resources available to pay the assessed forfeiture. Specifically, according to Weston's 1990 Statement of Assets, Weston has assets in excess of $1.6 million as of December 31, 1990, and liabilities to non-affiliates of only $323,805.[3] Furthermore, Weston is a partnership and no showing has been made that the general partner cannot pay the forfeiture. Thus, Weston's submission fails to demonstrate an inability to pay the forfeiture. Additionally, payment of the forfeiture will have no impact on the operation of the station since Weston is no longer the licensee. Accordingly, reduction of the forfeiture is not warranted.

8. Accordingly, Weston's Response to Notice of Apparent Liability IS DENIED. IT IS ORDERED, that Weston Properties XVIII Limited Partnership, licensee of radio station WKBR(AM), Wellesley, Massachusetts, FORFEIT to the United States the sum of eight thousand dollars ($8,000) for the violation of Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3540(a) of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission, at the address indicated in the attachment to the Memorandum Opinion and Order, a check or similar instrument payable to the Federal Communications Commission. In regard to the forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.115 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

[3] Weston's current liabilities as of December 31, 1990, of $920,794 include notes payable to affiliates of $552,334, accounts payable to affiliates of $29,655 and accounts payable to general partner of $15,000, thus leaving a balance of current liabilities to non-affiliates of $323,805.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-207**

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Riverside,
California, in the Los Angeles-
San Bernardino-Corona-Fontana,
California, Television Market

**REPORT & ORDER**
**(Proceeding Terminated)**

**Adopted: November 29, 1993; Released: December 7, 1993**

By the Chief, Mass Media Bureau:

1. Before the Commission is the *Notice of Proposed Rule Making* in MM Docket No. 93-207, 8 FCC Rcd 4783 (1993) ("*Notice*"), issued in response to a petition filed by Fouce Amusement Enterprises, Inc. ("Fouce"), licensee of television station KRCA(TV), Channel 62 (Independent), Riverside, California, to amend Section 76.51 of the Commission's Rules, 47 C.F.R. 76.51, to add Riverside as a designated community in the Los Angeles-San Bernardino-Corona-Fontana, California, television market.

2. In the *Notice*, we tentatively concluded that a sufficient case for redesignation of the subject market had been set forth such that the proposal should be tested through the rulemaking process. We noted that the information before us in the petitioner's request indicated that KRCA and stations licensed to communities in the subject television markets do compete for audiences and economic support throughout much of the combined market area, and that sufficient evidence had been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole. Moreover, we observed that the petitioner's proposal appeared to be consistent with the Commission's policies regarding redesignation of a hyphenated market.

3. Fouce filed comments underscoring the factors addresses in its petition, and urging the adoption of its proposed rule amendment. Comments were also filed by Community Cablevision Company ("CCC"), a California corporation doing business as Dimension Cable Services and an area cable television system operator, which opposes amendment of Section 76.51 of the Rules to include Riverside as a designated community in the market. CCC states that it has filed with the Commission a "Petition for Emergency Special Relief" seeking to have a number of broadcast stations, including KRCA, excluded for must-carry purposes from certain communities in the Los Angeles area. In that petition, CCC argues, among other things, that Riverside is in fact a distinct community with vastly different needs and interests from other areas of the Los Angeles television market. It maintains in the instant case that including Riverside in the hyphenated Los Angeles market will "only serve to make it easier for KRCA to obtain must-carry rights in distant communities by relieving it of its obligation [under Section 76.55(c)(2) of the Commission's Rules] to indemnify cable systems of the copyright liability that would otherwise be incurred as a result of its carriage." CCC argues that expanding the must-carry rights for KRCA to areas where it offers no significant local programming and where the station would otherwise be a "distant signal" would be contrary to the concept of localism on which the must-carry rules are based. In addition, CCC alleges that cable operators in the market are already facing an "overwhelming burden" in implementing the must-carry rules due to the large number of market-area commercial and noncommercial broadcast stations that are potentially entitled to mandatory signal carriage and "the corresponding diminution of the operators' editorial discretion." In its case, CCC states that it has been forced to reduce or drop other cable programming services in order to carry less desirable programming. CCC thus maintains that "making it easier" for stations such as KRCA to obtain signal carriage rights on cable systems in the Los Angeles area is contrary to the public interest by diminishing cable operators' editorial discretion and cable subscribers' satisfaction with the programing made available on cable.

4. In reply comments, Fouce maintains that "making it easier for KRCA to obtain must-carry rights" in cable communities within the Los Angeles ADI is precisely what Congress intended by directing the Commission, in Section 614(f) of the Communications Act, as amended, 47 U.S.C. Section 614(f), to make "necessary revisions to update Section 76.51" of the Rules. It asserts that that section of the Act, as implemented through rulemakings proceedings such as this, is intended remove any copyright royalty obstacle to a station's obtaining signal carriage as other market-area stations with which it genuinely competes.[1]

## DISCUSSION

5. For the reasons outlined in the *Notice*, we believe that amendment of Section 76.51 as requested by the petitioner is consistent with the procedures outlined in Section 4 of the Cable Television Consumer Protection and Competition Act of 1992,[2] which amended Section 614(f) of the Communications Act of 1934, and will serve the public interest by meeting the underlying purposes of the market hyphenation rule to equalize competition among stations in genuine competition. *See, e.g., Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122 (1985). CCC's special relief petition seeks, among other things, to exclude KRCA from mandatory carriage on certain of its Los Angeles systems, but CCC does not seek to exclude the

[1] Fouce also notes that CCC has already agreed to carry KRCA on its system for three years in exchange for reimbursement for any distant signal royalties incurred by CCC as a result of that carriage. Thus, it suggests that CCC's basis for opposing the proposed amendment of Section 76.51 "appears to be moot as well as irrelevant."

[2] Pub. L. No. 102-385, 106 Stat.1460 (1992).

station on systems within the ADI that are more proximate to Riverside or may have historically carried the station. Thus, while the CCC petition is directed to the must-carry status of KRCA with regard to specific communities and certain systems within the ADI, the Fouce petition is instead directed to the copyright status of the stations *if* carried by market-area systems. Amendment of Section 76.51 of the Rules as proposed in this case is, in our view, without prejudice to CCC's efforts to defeat the must-carry status of KRCA on certain specific systems within the subject ADI.[3] While it might be true that Riverside may be a community with distinct needs and interests from other distant communities within this large ADI, CCC's comments do not demonstrate that the action requested is inappropriate given the market as a whole. Concerns regarding the must-carry rights of specific stations on market-area cable systems in specific communities are properly addressed in petitions for special relief -- as CCC has done. However, inasmuch as CCC's comments do not materially challenge or address the tentative conclusions outlined in the *Notice*, it appears that amendment of Section 76.51 of the Rules as proposed is warranted.

6. Accordingly, pursuant to delegated authority,[4] IT IS ORDERED that, effective thirty (30) days after publication in the Federal Register, Section 76.51(a) of the Commission's Rules, Major Television Markets, IS AMENDED to include Riverside, California, as follows:

Los Angeles-San Bernardino-Corona-Fontana-Riverside, California

7. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[3] In this regard, an appropriate disposition of CCC's special relief petition is proceeding on a separate track.
[4] *See Report and Order* in MM Docket No. 92-259, 8 FCC Rcd 2965, 2978, n.150 (1993).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**

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In re: WANV(AM), Waynesboro, VA
BAL-930129EB

WANV-FM, Staunton, VA
BALH-930129GF

**Adopted: November 30, 1993; Released: December 1, 1993**

Dear Counsel:

This letter refers to the above-captioned applications for consent to assign the licenses of WANV(AM), Waynesboro, Virginia, from WANV, Inc. to WANV-LP and WANV-FM, Staunton, Virginia, from High Fidelity Music Show, Inc. to WANV-LP and the March 12, 1993 petitions to deny those assignments filed by Slocumedia, Inc. and Hometown Media, Inc. ("SI & HMI"), respectively, the licensee and proposed assignee of WAYB(AM), Waynesboro, Virginia, and M. Belmont VerStandig, Inc. ("MVI"), licensee of WSVA(AM) and WQPO-FM, Harrisonburg, Virginia (collectively, "Petitioners").[1] On March 25, 1993, WANV-LP filed a consolidated opposition to the March 12 petitions to deny.[2]

In the assignment applications, WANV-LP states that its general partner, Clark Broadcasting Company ("Clark"), is the licensee of two radio stations, WKDW(AM) and WKDW-FM, Staunton, Virginia. Since the principal community contours of WKDW, WKDW-FM, WANV(AM) and WANV-FM overlap, WANV-LP included in its assignment applications an exhibit pursuant to 47 C.F.R. § 73.3555(a)(1),[3] which demonstrates that there are 27 radio stations with overlapping principal community contours in the composite coverage area of the proposed commonly owned stations and that the combined audience share of the four stations, analyzed using Arbitron Spring 1992 county-by-county ratings data, is 13 percent.

On March 12, 1993, Petitioners filed separately two petitions to deny WANV-LP's assignment applications, alleging that WANV-LP improperly used county ratings data in determining the stations' combined audience share.[4] Petitioners essentially argue that the assignment applications should be denied because: (i) WANV-LP should have calculated the audience share based on the Commission's method for determining audience share where the stations in question are located in a metro market or a recognized equivalent;[5] (ii) WANV-LP's use of Arbitron county ratings data, rather than the Staunton/Waynesboro Birch Defined Metro Market, is arbitrary and irrational; and (iii) the proposed acquisition would result in excessive concentra-

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[1] Slocumedia, Inc. and Hometown Media, Inc. filed a mutual petition to deny; M. Belmont VerStandig, Inc. filed a separate petition to deny.

[2] Slocumedia, Inc. and Hometown Media, Inc. filed a single reply on April 6, 1993. Thereafter, on June 4, 1993, Petitioners filed a consolidated further petition to deny. WANV-LP filed an opposition to the consolidated further petition to deny on June 17, 1993, and a supplement to the opposition on June 29, 1993. Petitioners filed a consolidated reply on June 28, 1993.

[3] Section 73.3555(a)(1) of the Commission's rules states in pertinent part:

> No license for an AM or FM broadcasting station shall be granted to any party . . . if the grant of such license will result in overlap of the principal community contour of that station and the principal community contour of any other broadcasting station directly or indirectly owned, operated, or controlled by the same party, except . . . [i]n radio markets with 15 or more commercial radio stations, a party may own up to 2 AM and 2 FM commercial stations, provided, however, that evidence that grant of any application will result in a combined audience share exceeding 25 percent will be considered *prima facie* inconsistent with the public interest.

[4] *See* Petition to Deny of Slocumedia, Inc. and Hometown Media, Inc., dated March 12, 1993 and Petition to Deny of M. Belmont Verstandig, Inc., dated March 12, 1993. SI & HMI's and MVI's arguments presented within their petitions, have been combined above.

[5] Section 73.3555(a)(3)(iii) states that, where a "majority of the overlap between the stations in question takes place" in a radio

tion of control in the Staunton/Waynesboro radio market or more specifically in Augusta county, which comprises the Birch Defined Metro Market.[6]

First, Petitioners indicate that both Arbitron and Birch Radio had previously designated the Staunton/Waynesboro area as a metro market. Petitioners contend that, according to the Spring 1991 Birch Survey, Clark's existing AM/FM combination, WKDW(AM)-FM, already has a combined audience share of more than 25 percent. Petitioners assert that the only reasons the Staunton/Waynesboro and Augusta county area is no longer defined as a metro market are because Arbitron no longer had any subscribers in the area and Birch Radio went out of business. Second, Petitioners contend that the standard the Commission applies in determining audience share where a metro market exists should apply in this case, even if a currently recognized metro market does not exist. Specifically, according to Petitioners, Section 73.3555(a)(3)(iii) provides that, even if the proposed commonly owned stations serve more than one radio metro market, the Commission should confine the audience share determination to the market "in which a majority of the overlap between the stations in question takes place." 47 C.F.R. § 73.3555(a)(3)(iii). Petitioners contend that the entire area of mutual overlap between the proposed commonly owned stations occurs within Augusta county, resulting in a combined audience share of 35 percent for Augusta county. Petitioners assert that under these circumstances, WANV-LP would be overstepping the 25 percent audience share limit mandated by Section 73.3555(a)(1). Petitioners further contend that the principal community contours of the stations already owned by Clark are confined to Staunton and Augusta county, and the principal community contours of the stations to be acquired only cover a tiny fraction of adjacent Rockingham county and Harrisonburg. Petitioners assert that it is arbitrary to include audience share data from other counties when three of the four stations in question serve only Augusta county, and the fourth station serves only a slight portion of another county. Finally, Petitioners argue that 8 granting the proposed acquisition would permit Clark to "pit four local radio stations against an AM-FM combination (WTON(AM) and WTON-FM) and one FM standalone (WSKO) in a radio market (Staunton/Waynesboro and Augusta county) with a population of 97,687."[7] According to Petitioners, allowing a combination that would result in an excessive concentration of control is inconsistent with the policy behind the revised radio ownership rules.

WANV-LP, in its consolidated opposition, argues that the Commission's ownership rules provide that where a metro market does not exist, audience share figures should be determined based on audience share data "for all counties that are within the principal community contours of the stations in question, in whole or in part." 47 C.F.R. § 73.3555(a)(3)(iii). WANV-LP contends that no designated metro market or recognized equivalent exists to substitute for the county-by-county data required by the Commission's rules. WANV-LP claims that Arbitron stopped designating Augusta county as a separate metro market in 1989, and Birch Radio went out of business in 1991. WANV-LP also argues that a lack of subscribers is only one of ten factors Arbitron considers in determining whether to modify its designated metro markets. In fact, according to WANV-LP, the other nine factors considered by Arbitron are wholly unrelated to "subscriber levels." WANV-LP further argues that Petitioners are attempting to rewrite the Commission's multiple ownership rules by proposing that WANV-LP, in applying county-by-county data, should have used audience share data only from the counties where the principal community contours of the proposed commonly owned stations overlap. WANV-LP states that Petitioners have failed to present any evidence that the Commission intended anything but the plain meaning of the language in the county audience share data provisions of the rules.

In reply, SI & HMI reiterate their earlier allegations and further assert that WANV-LP's applications should be dismissed because Clark, in its opposition, materially misrepresented to the Commission the facts and the law surrounding the proposed acquisition in that: (i) the Birch metro survey is not outdated and should have been included in WANV-LP's assignment application; and (ii) the Commission's method for applying county data is not contained in the multiple ownership rules and therefore, Petitioners are not precluded from asserting that the method is arbitrary and irrational.

First, SI & HMI contend that Clark, aside from including Arbitron county data, should have included the Spring 1991 Birch Radio Survey in its assignment applications. SI & HMI indicate that the Commission does not name Arbitron as the exclusive source for audience share data. In fact, the Commission requires that an applicant for an assignment include all audience share data in the market that are readily available to the applicant. *Memorandum Opinion and Order*, 7 FCC at 6399. SI & HMI contend that the Birch survey conducted in the Spring of 1991 is as current as the Arbitron county ratings data relied on by Clark in the assignment applications because the Arbitron data were based on field-work also conducted in 1991. SI & HMI further contend that Clark should have disclosed in its assignment application that it used the Birch Radio Spring 1991 survey as a sales tool in 1991 and 1992. SI & HMI support this contention by attaching the declaration of Susanne Mowbray, former general sales manager of WKDW(AM)-FM, who states that Clark's salespersons presented to local and regional advertisers that its combined market share for WKDW(AM)-FM was 25.6 percent. SI &

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metro market, the "combined audience share" is the aggregate listening share within the metro for all stations proposed to be commonly-owned. *See* 47 C.F.R. § 73.3555(a)(3)(iii).

[6] Additionally, MVI argues that because it has raised a *bona fide* issue as to compliance with the 25 percent audience share limit, this matter should be acted upon by the full Commission. WANV-LP does not address this issue. In the proceeding adopting the revised radio ownership rules, the Commission noted that while the staff has delegated authority to act on applications that are in compliance with the revised rules, any applications that involve issues as to compliance with the Commission's 25% audience share cap and all cases involving alternative (non-Arbitron) showings that cannot be clearly resolved, will be referred to the full commission until such time as applicable precedents have been established. *Memorandum Opinion and Order and Further Notice of Proposed Rule Making* in MM Docket No. 91-140, 7 FCC Rcd 6387, 6400 n.78 (1992) ("Memorandum Opinion and Order"). For the reasons set forth in the text, we find that Petitioners have failed to present a *bona fide* issue as to compliance with the Commission's 25 percent audience share limit and therefore, action by the full Commission is not necessary.

[7] Petition to deny of Slocumedia, Inc. and Hometown Media, Inc. at 15.

HMI argue that the Birch survey should not be "current" for sales purposes in 1991 and 1992, and yet "outdated" for multiple ownership compliance in 1993. Second, SI & HMI argue that, contrary to Clark's assertion, they are not challenging the revised radio ownership rules, but rather, the Commission's county ratings methodology. SI & HMI assert once again that only Augusta county ratings data are relevant to determining the combined audience share of the proposed commonly owned stations since that is where all of the overlap of principal community contours of the four stations takes place.

On May 19, 1993, WANV-LP filed an amendment to its assignment applications, demonstrating that the applications should be granted even if the Commission were to accept Petitioners' claim that Augusta county should be considered a metro market. Therein, WANV-LP submitted a copy of the Spring 1992 Arbitron Radio Custom Survey Area Report for Augusta county, conducted during the Spring months of 1992, which shows a combined audience share rating for WKDW, WKDW-FM, WANV, WANV-FM of 20.7 percent.

On June 4, 1993, SI & HMI and MVI filed a consolidated further petition to deny, alleging that Clark's May 19, 1993 amendment omits material representations of fact. Specifically, Petitioners allege that Clark knew that the Radio Custom Survey Area Report (CSAR) did not constitute a valid measure of the audience share of stations serving Augusta county. Petitioners support this allegation with another affidavit by Susanne Mowbray, who states that she was specifically instructed by the general manager of Clark's stations not to use the CSAR survey report in her sales presentations without first disclosing that the survey was not reliable because there weren't enough tabulated diaries from Augusta county. Petitioners further challenge Clark's amendment stating that: (i) Clark did not refer to the CSAR at all in its March 25, 1993 consolidated opposition, thereby denying Petitioners the opportunity to challenge the survey's value and relevance; and (ii) Clark failed to submit a description of the methodology used in the survey as required by Section 73.3555(a)(1)(ii). Petitioners also allege that Clark's applications should be denied because Clark concealed from the Commission the existence of the 1991 Birch survey for the Staunton-Waynesboro area and the unreliability of Arbitron's CSAR.

WANV-LP, in its opposition to the consolidated further petition,[8] asserts that: (i) the May 19, 1993 amendment was timely filed; (ii) the CSAR is a reliable and accurate representation of the four stations' combined audience share in Augusta County; and (iii) WANV-LP did not conceal the Birch survey, because Birch Radio went out of business in 1991. First, WANV-LP contends that the amendment was intended to supplement the information within the assignment applications and not to re-open the pleadings. Furthermore, WANV-LP indicates that the Commission's rules do not restrict the time period within which amendments to assignment applications must be filed. Second, WANV-LP asserts that the CSAR provides the most up-to-date information regarding the stations' combined audience share in Augusta county.[9] WANV-LP further asserts that the CSAR is based on the standard methodology Arbitron uses to conduct all of its audience surveys.[10] WANV-LP, to support its claim that the May 19, 1993 amendment did not misrepresent facts to the Commission, introduces the declaration of Gerry Yasso, the general manager of WKDW(AM) and WKDW-FM, Staunton, Virginia. Yasso indicates that the general sales manager of WKDW and WKDW-FM investigated the statistical reliability of CSAR and after several discussions with Arbitron, determined that the CSAR was reliable. Finally, WANV-LP reiterates that the data from Birch's Spring 1991 survey are irrelevant because Birch is no longer in business.

On June 28, 1993, Petitioners filed a consolidated reply, specifically challenging WANV-LP's allegations that a metro survey might be unreliable just because one of the four stations involved has changed its call letters and program format. Petitioners contend that changes in call letters and programming occur frequently and should not be used to manipulate the Commission's application of these surveys in determining compliance with the radio ownership rules. Additionally, Petitioners questioned why Clark withheld the CSAR from the Commission for four months after the assignment applications were filed. Petitioners also question why WANV-LP claims that the CSAR is the most reliable and up-to-date survey, but still relies on Birch's Spring 1991 survey for marketing WKDW(AM).

In order to assess the merits of a petition to deny, a two-step analysis is required. First, Section 309(d)(1) of the Communications Act, as amended, requires that the petition to deny contain specific allegations of fact that, if true, are sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity. *See* 47 U.S.C. § 309 (d)(1) and (d)(2). If the petition meets this threshold requirement, the Commission must then examine all of the material before it to determine whether there is a substantial and material question of fact requiring resolution in a hearing. *See Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988). Even assuming, *arguendo*, that Petitioners' allegations establish a *prima facie* case, based on an examination of the applications, the petitions, oppositions and related pleadings, we conclude, in light of the circumstances discussed below, that the matters do not otherwise raise any substantial or material questions of fact that would require resolution in a hearing.

In the proceeding establishing the limits on radio ownership, the Commission determined that a single entity would be allowed to own up to two AM and two FM broadcast stations in a single market if there are 15 or more stations in that market and the proposed combination does not lead to "excessive concentration in the market." Excessive concentration is presumed where the stations to be jointly owned have a combined audience share exceeding 25 percent. *Memorandum Opinion and Order*, 7 FCC Rcd at 6393; 47 C.F.R. § 73.3555(a)(1)(ii). The Commission emphasized that audience share is best measured with widely-used audience survey data such as Arbitron because such data are probative and accessible measures of market power. *Memorandum Opinion and Order*, 7 FCC Rcd at 6397. Therefore, if audience share data for the market are readily available from Arbitron or a

[8] WANV-LP filed its opposition June 17, 1993.

[9] WANV-LP states that the CSAR is the only one of the three surveys that reflects the February, 1992 changes to the call sign and format of WKDW-FM.

[10] WANV-LP submitted a complete copy of the CSAR, including a description of Arbitron's methodology and a statement of its reliability with the May 19, 1993 amendment.

similarly published ratings service, applicants will be required to provide that audience share data. However, where no metro market or recognized equivalent exists, "the relevant audience share data is the data for all counties that are within the principal community contours of the stations in question, in whole or in part." 47 C.F.R. § 73.3555(a)(3)(iii). The Commission further determined that if county data are used and more than one county is touched by the principal community contours of the stations in question, the audience share data for all counties involved shall be weighted based on population. *Memorandum Opinion and Order*, 7 FCC Rcd at n.73. Further, in *Franklin Communications Partners, L.P.*, 8 FCC Rcd 4909 (1993), the Commission held that "evidence of the combined audience share will be evaluated based on the most recent published survey data available at the time the application is filed."

In the instant case, Petitioners contend that we should take cognizance of a Birch 1991 Spring Survey, designating Augusta County as a "defined market," in determining the applicant's compliance with the 25 percent audience share limit. While the Commission stated that it would calculate audience share data based on metro market data where such data are available, we do not believe we should give greater weight to data and market definitions generated from a defunct organization that no longer has continuing collection and publication capability when data have been submitted from a recognized, reliable and accessible continuing source. In this regard, Birch Radio went out of business in 1991. The applicants filed their applications in 1993, relying on the most recently published audience share data available at the time the applications were filed, namely Arbitron's 1992 Spring Survey. This survey did not designate Augusta County or the Staunton/Waynesboro area as a metro market. In fact, Arbitron last designated this area as a metro market in 1989. No basis has been provided for us to determine whether Birch's decision to designate the County as a "metro," or Arbitron's decision not to designate a "metro," was the more appropriate. However, since Arbitron is presently the only recognized organization surveying the area and since such surveys, upon which the Commission may need to rely in future cases involving area stations, do not designate a metro market, we believe greater weight should be afforded to the data and methodology provided by the only company continuing to collect and publish audience share information. We further note that while Petitioners assert that both Birch and Arbitron data were collected in 1991, we are presented with no evidence that the Birch audience share totals were based on data that were more recent than Arbitron's county totals. The Commission recognized that widely-used audience survey data may not be exact, but that they are a probative and accessible measure of market power relevant to the Commission's regulatory concerns. *Memorandum Opinion and Order*, 7 FCC Rcd at 6397. In this regard, the Commission has expressed an interest in monitoring audience share data in particular circumstances by the continued availability of data from an accessible source. *See Franklin Communications Partners, L.P.*, 8 FCC Rcd at 4911-12. The continuing availability of data from a widely-published source is also important to both applicants and challengers seeking to point out inaccuracies or anomalies in submitted data. *See Memorandum ' Opinion and Order*, 7 FCC Rcd at 6397-98. Thus, under the facts of this case, the continuing availability of audience share data from Arbitron warrants us to conclude that the information submitted in the application, using Arbitron as the source, represents the most probative evidence available as to the applicant's compliance with the Commission's audience share requirements.

Regarding Petitioners' arguments that the use of county data in determining the combined audience share should be confined to only those counties where the overlap of principal community contours of the proposed commonly owned stations occurs, we find that the language of the Commission's rules is clear. Section 73.3555(a)(3)(iii) states that where no metro market or recognized equivalent exists the relevant audience share data to be used is data for all counties that are covered in whole, or in part, by the proposed combination. *See* 47 C.F.R. § 73.3555(a)(3)(iii). Furthermore, as noted, the Commission has clearly stated that when county data is used, the audience data for all counties involved will be weighted based upon the populations of the counties. Petitioners' arguments as to the validity of this procedure amounts to a request to reconsider the radio ownership rulemaking proceeding and is not appropriate in the context of this case. *See Patteson Brothers, Inc.*, FCC 93-472, released October 25, 1993. WANV-LP has submitted evidence that the combined audience share for the proposed combination, based upon the most recent audience share data available at the time of filing, does not exceed 13 percent. This figure is clearly within the Commission's 25 percent audience share limit.

Finally, we find no basis for Petitioners' allegations of misrepresentation by WANV-LP for not presenting the Birch data to the Commission. It was reasonable for the applicant to assume that Arbitron data was the only relevant data for purposes of demonstrating compliance with the ownership rules since, when the applications were filed in 1993, Arbitron was the only organization continuing to collect and publish audience share information, the Arbitron data was at least as current as the Birch data and Birch had been out of business for over one year. Under such circumstances, we find no evidence of a deliberate attempt to mislead the Commission or misrepresent salient facts.

In view of the foregoing, we conclude that there are no remaining substantial and material questions of fact, that the applicant is qualified to be a Commission licensee, and that a grant of the subject assignment applications would be in the public interest. Accordingly, the petitions to deny and the consolidated further petition to deny the applications, filed by Slocumedia, Inc, Hometown Media, Inc. and M. Belmont Verstandig, Inc, ARE HEREBY DENIED. Additionally, the applications for consent to assign the licenses of WANV(AM), Waynesboro, Virginia, from WANV, Inc. to WANV-LP (File no. BAL-930129EB), and WANV-FM, Staunton, Virginia, from High Fidelity Music Show, Inc. to WANV-LP (File no. BALH-930129GF), ARE HEREBY GRANTED.

Sincerely,

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 90-352**

In re Applications of

Ronald E. Patterson & Cal E. Varner d/b/a CAPITOL CITY BROADCASTING COMPANY — File No. BPH-880812MZ

MATTHEW WILLIAMS — File No. BPH-880816OC

For Construction Permit for a New FM Station on Channel 247C2 in Longview, Texas

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 22, 1993; Released: December 7, 1993**

By the Commission:

1. In this proceeding, the Review Board disqualified Matthew Williams on a lack of candor/misrepresentation issue, affirmed the ALJ's denial of Williams' various requests for financial issues against Capitol City, denied Williams' request to reopen and remand the proceeding on similar financial issues, and granted Capitol City's application.[1] Based upon the pleadings before us,[2] we agree with and affirm the Board's disqualification of Williams. We conclude, however, that there are substantial and material questions as to Capitol City's basic qualifications. We therefore deny to the extent reflected herein and dismiss in all other respects Williams' application for review,[3] grant to the extent reflected herein and dismiss in all other respects his Second Petition to Reopen the Record, set aside the Board's grant of Capitol City's application and remand the case for further evidentiary hearings.

**BACKGROUND**

2. To fund its application, Capitol City relies on a loan commitment letter, dated July 16, 1988, in the amount of $275,000 from Malvin Patterson, whose son, Ronald Patterson, is a 50% owner of the application. (The amount of the commitment was originally redacted but ultimately revealed). To rebut Williams' allegations concerning Capitol City's financial qualifications, Capitol City submitted a statement under penalty of perjury from Ronald Patterson verifying that he had reviewed Malvin's financial statement before certifying that Capitol City was financially

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[1] *Capitol City Broadcasting Company*, 8 FCC Rcd 1726 (Rev. Bd. 1993), affirming, 7 FCC Rcd 1938 (Initial Decision 1992).

[2] In addition to the pleadings listed in note 7 below, the following pleadings are pending before the Commission: (a) Application for Review, filed April 12, 1993, by Williams; (b) an Opposition, filed April 27, 1993, by Capitol City Broadcasting Company; (c) Second Petition to Reopen the Record, filed April 14, 1993, by Williams; (d) Opposition to Second Petition to Reopen the Record, filed April 23, 1993, by Capitol City Broadcasting Company; (e) Further Opposition to Second Petition to Reopen the Record, filed April 28, 1993, by Capitol City Broadcasting Company; (f) Erratum to Further Opposition to Second Petition to Reopen the Record, filed April 29, 1993, by Capitol City Broadcasting Company; (g) Supplement to Further Opposition to Second Petition to Reopen the Record, filed May 6, 1993, by Capitol City Broadcasting Company; and (h) Reply to Oppositions to Second Petition to Reopen the Record, filed May 10, 1993, by Williams.

[3] In his application for review, Williams notes the Board's refusal to disqualify Capitol City or at least add a character issue against it based upon the February 12, 1992 signing by its 50% owner, Ronald Patterson, of an "Agreement to Assessment and Collection of 100-Percent Penalty," consenting to a penalty for violation of 26 U.S.C. § 6672 of the Internal Revenue Code for Patco's not paying over to the IRS employment taxes withheld from the salaries of Patco employees. (Patco is Patterson's now-defunct company.) Although the Board observed that this is a case of first impression, we agree that a character issue is not warranted. At the outset, we note that the Commission has previously ruled that consent decrees are generally not relevant to character qualifications; rather, only adjudications are considered. *Character Policy Statement*, 6 FCC Rcd 3448 ¶ 6 (1991). Williams is correct that, if willful, such failure to collect or pay over taxes required to be withheld from employees' wages, is a felony, and that felony convictions are relevant under the *Character Policy Statement*, 5 FCC Rcd 3252 ¶ 4 (1990). However, the penalty to which Patterson agreed is civil in nature, *Gephart v. U.S.*, 818 F.2d 469 (6th Cir. 1987), and a finding of willfulness requires proof beyond a reasonable doubt that, when due, the taxpayer (i.e., the now defunct Patco) had sufficient funds to pay over taxes that had been withheld. *U.S. v. Poll*, 521 F.2d 329 (9th Cir. 1975). Moreover, the agency charged with enforcing the tax code has not sought a conviction against Ronald Patterson based on his consent to the penalty, and thus no adjudication was involved. Finally, the underlying tax violation is not so egregious, particularly given the lack of evidence of willfulness, as to shock the conscience or require further inquiry despite the absence of a conviction. *Character Policy Statement*, 5 FCC Rcd at 3254 n.5. We note, however, that evidence that the IRS has obtained a conviction against Patterson based on his consent to the 100% penalty would warrant reconsideration of this matter.

In a related matter, although the parties dispute, as they did before the Review Board, the amount of the penalty owed by Ronald Patterson for the failure to pay over the taxes withheld from the wages of Patco employees, we find no basis for a finding that Williams is guilty of abuse of process in rearguing this matter, as Capitol City contends.

qualified. Although Capitol City had produced a copy of the commitment letter in response to a discovery request, it did not submit a balance sheet documenting that at the time of certification Malvin Patterson had sufficient financial resources to meet the $275,000 commitment to the applicant.

3. In light of allegations that Ronald Patterson was virtually bankrupt[4] and that Malvin Patterson had repeatedly failed to pay real estate taxes on numerous properties in a timely manner, and the fact that Malvin Patterson had promised that he would intervene if lienholders proceeded directly against the station or its assets to satisfy Ronald's unpaid taxes,[5] Capitol City was requested to produce the financial statement that Ronald Patterson reviewed in certifying Capitol City's financial qualifications and/or a financial statement reflecting Malvin Patterson's net liquid assets at the time of certification, and a current financial statement reflecting Malvin Patterson's net liquid assets.[6] *Order*, FCC 93I-039, at ¶ 6 (OGC released July 6, 1993).[7] Such additional documentation was required because -- although the Board properly concluded that Williams had not raised a substantial and material question of fact warranting the addition of basic qualifications issues against Capitol City -- the precarious financial condition of Ronald Patterson, together with the lender's affirmative promise to intervene, raised significant concerns about the continuing viability of the applicant's financial proposal. In its response Capitol City submitted financial statements, dated May 1, 1988 and June 30, 1993, from Malvin Patterson, and a $275,000 loan commitment letter, dated July 21, 1993, from the State First National Bank of Texarkana, Arkansas. For the reasons set forth below, we find that there are substantial and material questions of fact requiring that we reopen the record and remand this proceeding for evidentiary hearings on false certification, misrepresentation/lack of candor, and financial qualifications issues against Capitol City.

4. Capitol City identifies the May 1988 financial statement as the one that Ronald Patterson reviewed in preparing to certify Capitol City's financial qualifications. It explains that the current financial statement, as well as the $275,000 bank letter to be secured by the assets listed on the current statement, are submitted, not to change the financial proposal, but to demonstrate Malvin Patterson's ability to liquidate his assets for purposes of financing the proposed station. According to Capitol City, the two statements reflect that Malvin Patterson's financial condition has not, as Williams' claims, deteriorated since 1988.[8] Acknowledging that most of Malvin Patterson's wealth derives from his real estate holdings, valued at $727,000 in May 1988 and $747,000 in June 1993, Capitol City urges that it was permissible for Malvin Patterson to rely on non-liquid assets to provide the funding required for the proposed station.

5. In reply, Williams urges that Capitol City's response confirms that it is not, and never has been, financially qualified, and that Ronald Patterson has repeatedly lied under oath regarding those financial qualifications. According to Williams, the two financial statements show that, contrary to the claim that Malvin Patterson had sufficient net *liquid* assets to fund the application, he had virtually no net liquid assets at certification or thereafter. According to Williams, the statements, despite the express request of the General Counsel's Order, fail to disclose the extent to which Malvin Patterson's real estate is subject to mortgages or other encumbrances.[9] He alleges further that the 1993

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[4] In addition to the tax liens noted in note 3 above, which Capitol City admits is almost $20,000 and which Williams alleges is closer to $60,000, Ronald Patterson is subject to outstanding judgments amounting to at least $14,151.60, he lost his home, he defaulted on his car loan, he was unemployed from October 1990 (when he was fired) to February 1993, and the company that he and his wife jointly owned, Patco Enterprises, is now out of business.

[5] See Declaration of Malvin Patterson at 1, dated April 28, 1992 and attached to Further Opposition to Second Petition to Reopen the Record, filed April 28, 1993, by Capitol City.

[6] See *Richardson Broadcast Group*, 7 FCC Rcd 1583, 1586 ¶ ¶ 15-16 (1992), where, despite the existence of a bank commitment letter issued with knowledge of the applicant's bankruptcy, questions were raised that could not be resolved solely on the applicant's reliance on the bankruptcy court's approval of its reorganization plan and its reliance on the proposed bank loan. *Cf. Weyburn Broadcasting Limited Partnership v. FCC*, 984 F.2d 1220 (D.C. Cir. 1993), remanding for hearing in light of numerous questions concerning the applicant's continuing financial qualifications.

[7] Capitol City filed a Response to Order on July 21, 1993; Williams filed a Request for Extension of Time on July 22, 1993 and a Reply to Response to Order, on August 2, 1993; Capitol City filed a Reply and a Petition for Leave to File Reply on September 1, 1993 and a Supplement to Reply on September 10, 1993; and Williams filed Comments on Unauthorized Reply of Capitol City on September 10, 1993. By his Request for Extension of Time, Williams sought a one-week extension of time in which to respond to the Response to Order. Pursuant to 47 C.F.R. § 1.4(h), however, Williams timely filed his Reply on August 2, 1993. The request for an extension of time is therefore moot and will be dismissed. As to the September 1, pleading filed by Capitol City, we find good cause to consider Capitol City's response because of the seriousness of the matters raised in Williams' August 2, 1993 Reply to Response, despite the facts that the General Counsel's Order did not authorize its filing, that Capitol City waited almost 30 days (twice the original filing period specified by the General Counsel's Order and nearly four times the time period accorded for Williams' responsive filing) before filing its reply, and that it did not explain this delay. See *Opal Chadwell*, 4 FCC Rcd 1215, 1216 ¶ 11 (1989). We will therefore grant Capitol City's September 1, 1993 Petition for Leave to File Reply.

[8] It appears that Malvin Patterson's financial position has declined only slightly since 1988. In this respect, the 1988 financial statement reflects a net worth of $790,654, which includes $19,578 in cash, $48,000 in notes receivable, $23,166 in stocks and bonds, life insurance with a cash surrender value of $10,000, personal property and equipment valued at $103,750, a business interest worth $20,000, and real estate valued at $727,000. In contrast, the June 1993 statement reflects a net worth of $787,607, real estate valued at $747,000, $14,375 in cash, $5300 in government securities, $1070 in other stocks and bonds, a business interest worth $20,000 as well as $82,750 in automobiles, equipment, furniture and other personal property. By its September 1, 1993 filing Capitol City acknowledges the inadvertent omission from the June 30, 1993 financial statement of an obligation of approximately $1850. Taking the unreported debt into account, the June 30, 1993 financial statement reflects a net worth of approximately $785,757.

[9] Attached to Williams' Reply is a Deed of Trust, dated November 26, 1991, in the amount of $2500 on Lot 14, Block 30, Beverly Heights Addition, which indicates that the Deed is secondary to a prior lien of April 1991. Williams notes that, while listing six properties owned by Malvin and Mae Patterson that are subject to mortgages, the financial statement does not list the amount of the mortgages, or whether there are second

bank letter is insufficient on its face and that, even if sufficient to demonstrate reasonable assurance, the letter would not establish Capitol City's financial qualifications at the time of certification. He therefore requests that we dismiss Capitol City's application or at least designate it for hearing on appropriate financial, false certification, and misrepresentation /lack of candor issues.

6. Capitol City admits, in a reply pleading filed on September 1, 1993, that Malvin Patterson did not have at the time of certification and does not now have sufficient net liquid assets to cover his $275,000 commitment to Capitol City, as that term is defined by the Commission. It denies, however, that Ronald Patterson falsely certified the applicant's financial qualifications or intentionally deceived the Commission as to Malvin Patterson's ability to fund Capitol City's application, or that Capitol City is, or ever was, financially unqualified. It relies in this regard on a statement under penalty of perjury, dated August 26, 1993, in which Ronald Patterson explains that he meant "net liquid assets" to include his father's "borrowing capacity," which, in his mind, reflects the ability to obtain a loan based upon all of his assets (including the real estate). Capitol City urges that, taking into consideration Malvin's total capacity to borrow, Ronald's statements concerning his father's liquidity were reasonable and accurate, and that they do not raise a material question of fact warranting the addition of a misrepresentation issue.

7. Turning to the question of its financial qualifications, Capitol City submits a declaration under penalty of perjury, dated August 31, 1993, from Malvin Patterson purporting to clarify certain discrepancies in the statements (that were raised by Williams' Reply)[10] and to corroborate the value of the real estate listed therein.[11] Based upon that statement, Capitol City claims that the 1988 and 1993 financial statements reflect non-liquid assets that are adequate to support a conclusion under Commission precedent that Malvin Patterson can raise the funds necessary to meet his $275,000 loan commitment to Capitol City.[12] Finally, it submits a declaration under penalty of perjury, dated August 31, 1993, from Mae Patterson, joint owner of the assets listed on the statements, indicating her awareness of, and her consent to, her husband's proposed loan to Capitol City.

## DISCUSSION

8. Having examined the pleadings before us in accordance with the standards for specifying a hearing, see *Astroline Communications Limited Partnership v. FCC*, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988); 47 U.S.C. § 309(e), we find that there are substantial[13] and material[14] questions as to whether Capitol City was financially qualified at the time of certification and whether Ronald Patterson made misrepresentations to the Commission or lacked candor concerning his father's ability to fund the application. We therefore designate appropriate issues against Capitol City and remand the proceeding for further evidentiary hearings.

9. *Financial Qualifications:* Non-liquid assets such as real estate may, as Capitol City alleges, provide reasonable assurance of financial qualifications, but only if the claimed value of those assets is adequately substantiated and if the assets are several times the value of the cash which such assets are relied upon to yield.[15] Neither financial statement satisfies Capitol City's burden of showing that at the time of certification its purported lender had the necessary financial resources to provide the $273,000 that Capitol City estimates it needs for construction and initial operation of the station.[16]

10. The 1988 financial statement allegedly reviewed by Ronald Patterson before certification reflects that at that time Malvin Patterson had a net worth of $790,654, the bulk of which consisted of non-liquid assets (including real estate allegedly valued at $727,000). Capitol City has not

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trusts or other liens or other encumbrances against any of the properties listed. According to Williams, it is impossible to determine whether the Beverly Heights property is even one of the six that are listed as being mortgaged.

[10] The statement under penalty of perjury from Malvin Patterson acknowledges that the Deed of Trust, discussed at n.9 supra, was inadvertently omitted from the 1993 financial statement, explains the circumstances surrounding the unreported Deed of Trust (which involved two loans totaling $5,000 from the Department of Housing with a current unpaid balance of $1,850), and indicates that this omission caused him to reexamine the June 1993 statement, which is otherwise accurate. Declaration of Malvin Patterson at 1-3 ¶ ¶ 4-6. Malvin Patterson's statement also contains an itemized ' list of properties that are subject to mortgages or other encumbrances, which corresponds roughly to the total amount of "Liens on Real Estate" reflected on the 1993 Statement. *Id.* at 7.

[11] Malvin Patterson verified that he separately estimated the market value of each parcel of land listed on his financial statements. He explains that those values were derived by observing sales of comparable properties in the same general area and by discussing the properties with local, experienced realtors who informally appraised the various properties. Declaration of Malvin Patterson at 1 ¶ 3.

[12] Capitol City submits that the net worth to need ratio is approximately 2.86 to 1, which is greater than the 1.5 to 1 ratio found to be acceptable in *Dodge-Point Broadcasting Company*, 11 FCC 2d 751 (1968). It notes that the net worth-need ratio in *Opal Chadwell*, 4 FCC Rcd 1215 (1989), was only 1: 1, a fact not cited by the Commission in concluding that questions raised by conflicting real estate appraisals warranted the addition of a financial issue. Citing *Christian Children's Network*, 101 FCC 2d 612, 614 ¶ 5 (1985), Capitol City further urges that the net worth-need ratio is irrelevant here because of the bank loan.

[13] A question is substantial if the totality of the evidence raises sufficient doubt on the matter as to require further inquiry. See *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985). See also *United States v. Messerlian*, 793 F.2d 94, 96 (3rd Cir. 1986).

[14] A material question is one that has legal significance or that affects the outcome of the litigation. See *Lipsett v. University of Puerto Rico*, 637 F. Supp. 789, 799 (D.P.R. 1986).

[15] *Texas Communications Limited Partnership*, 6 FCC Rcd 5191, 5194 n.7 (1991), citing *Coastal Bend Family TV, Inc.*, 94 FCC 2d 648, 656 ¶ 12 (Rev. Bd. 1983); *United Artists*, 4 RR 2d 453, 458-59 ¶ 12 (Rev. Bd. 1964) (financial qualifications issue not warranted where a small amount of money must be obtained from a large amount of non-liquid assets). See also *Real Life Educational Foundation of Baton Rouge*, 8 FCC Rcd 2675, 2676 ¶ 9 (1993), and the cases cited therein.

[16] Attached to Capitol City's September 1, 1993 pleading is an unredacted copy of the July 1988 commitment letter reflecting that Malvin Patterson has agreed to lend $275,000 to fund Capitol City's proposed station. Previously Capitol City had not, as Williams noted in its Reply, disclosed the exact amount of the commitment from Malvin Patterson. Reply, at n.3. Despite Williams' claims, we do not find, based upon the pleadings before us, that Capitol City's previous failure to disclose the amount of the proposed loan warrants further inquiry at this time.

met its burden of showing that these assets were readily convertible into cash at the time of certification.[17] Nor has it submitted valid appraisals or affidavits substantiating the claimed value of the real estate and the other illiquid assets at the time of certification, as is generally required where an applicant relies on illiquid assets as a basis of its financial qualifications.[18] See *Christian Children's Network*, 101 FCC 2d 612, 614 ¶ 5 (1985).

11. While purporting to rely on sales of comparable real estate and on informal appraisals given by experienced area realtors, Capitol City has not submitted, in connection with *any* property listed on either financial statement, any documentation of the allegedly comparable real estate transactions, sworn statements from realtors that Malvin contacted concerning his various real estate holdings or other evidence to corroborate the claimed value of those holdings. Although the Commission has, as Capitol City suggests, on occasion accepted something less than a formal appraisal, Malvin Patterson's blanket, unsupported recitation of the steps that he took in calculating the aggregate value of his various parcels of land falls far short of the "self-appraisals" that have been accepted in other cases.[19]

12. Even if the claimed values of the non-liquid assets had been adequately substantiated, Malvin Patterson had, according to the 1988 statement, less than $20,000 in cash and another $10,000 in life insurance that he could rely upon to meet his $275,000 commitment to Capitol City. With a net worth at that time of only $790,654, Malvin Patterson had to be able to generate the remaining $243,000 from non-liquid assets. The ratio of the claimed value of all of the non-liquid assets (including those that are subject to encumbrances) to the additional funds that the sale of those assets must yield ($760,654 to $243,000) would be roughly 3.13: 1, which is below what has been deemed to be acceptable in other cases.[20] In other words, the 1988 financial statement does not establish that at the time of certification Malvin Patterson had sufficient net liquid assets or readily convertible non-liquid assets to meet the financial requirements of the application.

13. Capitol City argues, however, that the 1993 financial statement and the 1993 bank loan demonstrate the lender's ability to liquidate his assets for the purpose of funding the station. But neither is probative of Malvin Patterson's ability to liquidate the assets in July 1988 when he agreed to fund Capitol City's application.[21] They therefore do not substantiate the validity of Capitol City's original certification, and in the absence of a showing of reasonable assurance at the time of certification, are not relevant to those questions concerning Capitol City's basic qualifications.[22]

14. Moreover, the 1993 financial statement lists a "contingent" liability of $20,000, which is identified as "Ronald Patterson (IRS)." This entry apparently refers to Malvin's pledge that "if either or both of these [tax] liens still exist after the grant of Capitol City's application and if either lienholder [the Internal Revenue Service or the State of Alabama] were to move against the radio station or its assets to satisfy Ronald's [unpaid tax] obligations, I will intervene to satisfy the lienholder so as to prevent the lienholder from seizing the station or its assets and from

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[17] Capitol City has the burden of showing that it is financially qualified. *Aspen FM*, 6 FCC Rcd 1602, 1603 ¶ 9 (1991). It has not demonstrated that $48,000 in accounts receivable are current or collectible in the short-term. *Port Huron Family Radio*, 5 FCC Rcd 4562, 4563 & n.5 (1986). Nor does the statement reflect that the $23,166 in stocks and bonds are readily marketable. *Vista Broadcasting*, 18 FCC 2d 636, 637 ¶ 3 (Rev. Bd. 1969).

[18] There is nothing to substantiate the $20,000 claimed value of Malvin's interest in the refuse company. See *Texas Communications*, 6 FCC Rcd at 5193 ¶ 14, citing *Opal Chadwell*, 4 FCC Rcd 1215 ¶ 6 (1989), in which the Commission held that the record must contain an appraisal substantiating the value of marketable securities and of a business interest; *Real Life*, 8 FCC Rcd at 2676 ¶ 11, in which the sheer magnitude of the purchase price of real estate holdings was supported by affidavit; *Port Huron*, 5 FCC Rcd at 4563 & n.5, in which the Commission reduced by one-third the fair market value of real estate in recognition of the fact that the net proceeds realized by sellers of real estate are generally less than the fair market value of the property.

[19] In *Dena Picture d/b/a Kaye-Smith Enterprises*, 98 FCC 2d 675 (Rev. Bd. 1984), cited by Capitol City, the applicant sought to rely on two parcels of real estate to demonstrate that he could raise an additional $114,000. Evidence that he had had a sales contract for $225,000 for both parcels that ultimately fell through and that a second parcel, a condominium, was on the same floor as a comparable unit that had been sold for $130,000 the year before was deemed adequate to support a claimed valuation of $200,000 for the two parcels.

[20] *Texas Communications*, 6 FCC Rcd at 5194 n.7, in which a ratio of slightly more than 2: 1 was insufficient; *Central Florida Communications*, 8 FCC Rcd 4128, 4130 ¶ 11 & n.8 (Rev. Bd. 1993), application for review pending, in which a ratio of 2.8: 1 was deemed to be substantially less than ratios allowed in other cases. See also *Cornwall Broadcasting Corp.*, 89 FCC 2d 704 (Rev. Bd. 1982), in which an asset to loan ratio of 16 to 1 was deemed acceptable; *Cannon's Point Broadcasting*, 93 FCC 2d 643 (Rev. Bd. 1983), in which an asset to loan ratio of 20 to 1 was acceptable; *International Broadcasting Co.*, 7 RR 2d 302 (1966), in which an asset ratio of approximately 53 to 1 was accepted. *Opal Chadwell*, 4 FCC Rcd 1215 (1989), in which the Commission added a financial issue based upon the absence of valid appraisals for non-liquid assets without regard to whether the value of those assets was several times the funds needed to finance the station, does not support Capitol City's claim that a ratio of 1: 1 would have been deemed acceptable had the value of the assets been substantiated with valid appraisals. *Dodge-Point Broadcasting Company*, 11 FCC 2d 751 (1968), cited by Capitol City, is also inapposite. That case has nothing to do with the net worth-funds needed ratio. In a case decided under *Ultravision's* one-year standard, the Commission reasoned that, where the applicant had sufficient liquid assets to cover the cost of construction and anticipated initial revenues of $46,000 based upon the initial experience of a nearby station, the station could be expected to realize revenues of at least $11,000 during the year, an amount sufficient to cover any shortfall, even assuming that real estate valued at $44,600 would sell for only $31,000.

[21] Therefore, Capitol City cannot rely on *Christian Children's Network*, 101 FCC 2d at 614 ¶ 5, where the net worth-funds needed ratio was held to be irrelevant because of the existence of a bank letter collaterialized by non-liquid assets. Nor is the 1993 bank letter an adequate substitute for valid appraisals or other probative evidence corroborating the value of the non-liquid assets listed on 1988 financial statement under *Rose Broadcasting Company*, 68 FCC 2d at 1246 ¶ 7. There, the applicant relied on real estate supported by a valid appraisal and a bank loan collaterialized by other non-liquid assets. Because there was an affidavit from the bank indicating that it had evaluated the assets, the loan was evidence of their value.

[22] The Commission has indicated that an applicant may not establish due diligence for a belated financial proposal in the absence of a demonstration by the applicant that he had reasonable assurance of financing at the time of certification. See, e.g., *Aspen FM*, 6 FCC Rcd at 1603-04 ¶ 13, and the cases cited therein.

interfering with the operation of the station."[23] Notwithstanding Ronald Patterson's efforts to satisfy the tax liens without his father's help, the tax liens have not been fully paid and thus, by virtue of Malvin's intervention promise, are a current liability as long as they remain unsatisfied.[24] Not only should the resulting obligation have been reflected as a current liability on the June 1993 financial statement, but it materially increases Malvin Patterson's total funding commitment to Capitol City, a fact that Capitol City overlooks in claiming that Malvin has assets several times the amount needed to fund the applications.

15. Thus, there are substantial questions as to whether Capitol City's lender had sufficient net liquid or readily convertible illiquid assets to provide reasonable assurance of the availability of funding when Ronald Patterson certified that Capitol City was financially qualified, whether that certification was false, and whether it is financially qualified today.[25] This requires the specification of financial and false certification issues against Capitol City.

16. If the ALJ determines on remand that Capitol City was financially qualified at the time of certification and proceeds to consider its present financial qualifications, he may consider whether the 1993 bank letter, together with Malvin's June 1993 financial statement, are probative of his current ability to liquidate his assets, and thus of the applicant's current financial qualifications. In this respect, we in no way prejudge the questions that Williams raises concerning the legal sufficiency of the 1993 bank letter to provide reasonable assurance. We mean only to indicate that the ALJ has discretion to consider these matters.

17. *Lack of Candor/Misrepresentation:* Additional questions exist as to the candor of Ronald Patterson concerning his father's ability to fund the loan to Capitol City. Capitol City has claimed throughout this proceeding that the 1988 statement, which Ronald claims to have relied on in certifying the applicant's financial qualifications, reflected that Malvin had sufficient net *liquid* assets to fund the application. However, as reflected above and as Capitol City admits in its response, that statement clearly shows that Malvin's assets at the time of certification were largely illiquid and that he had almost no net liquid assets. This apparent lack of candor would warrant further inquiry even if it were ultimately concluded that Capitol City had adequately substantiated the asserted value and convertibility of those non liquid assets into cash at the time of certification and shown that those assets were several times the value of the amount of the proposed loan from Malvin Patterson so as to provide reasonable assurance that the required funds would be available.

18. In this regard, Ronald Patterson testified that, as a former bank president, he has a general knowledge of finance and that, having attended a workshop for broadcast applicants, he was aware of the Commission's financial requirements. He repeatedly represented that the 1988 statement established that his father had sufficient net liquid assets to fund the application. In a April 19, 1991 declaration, submitted in response to Williams' first Petition to Enlarge Issues, Patterson stated that "[he] was able to determine [from the 1988 financial statement] that [his] father had sufficient net liquid assets to provide Capitol with his proposed loan, and was able to certify that Capitol had sufficient net liquid assets available to it to construct its proposed facility and operate it for three months without revenue."

19. Patterson later explained, in deposition testimony taken on April 26, 1991, what he had meant by "net liquid assets" in the earlier declaration. He defined liquid assets as "[j]ust his cash availability, also his borrowing capacity, his unused borrowing capacity, his line of credit, his investment in stocks and bonds," and he defined "sufficient net liquid assets" for FCC purposes as "assets that were unencumbered that could be quickly converted to cash in excess of the amount that [the applicant] needed to build and operate this station for three months.[26] In an affidavit, dated August 26, 1993, Ronald Patterson explained that "borrowing capacity" was intended to include not only established lines of credit and other existing credit facilities but also his father's ability to borrow relying upon all of his assets as collateral (including real estate). Nonetheless, Patterson indicated at the deposition that he understood "net assets" to be assets after deducting liabilities. He testified again at hearing that in certifying Capitol City's financial qualifications he had assured himself that his father was sufficiently liquid to lend Capitol City the required funds. (Tr. 106).

20. Even assuming that Capitol City can adequately document the claimed value and convertibility of Malvin's stocks, bonds, and accounts receivable at the time of certification -- which the conclusory and undocumented 1988 statement from Malvin does not establish on its face -- he would have had $90,744 in cash and "liquid" assets, an amount clearly insufficient to meet $140,840 of liabilities reflected on the statement, let alone provide the $273,000 that Capitol City estimates it needs to construct and operate

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[23] See Declaration of Malvin W. Patterson, Jr., dated April 28, 1993, that is attached to Capitol City's April 28, 1993 Further Opposition to Second Petition to Reopen the Record.

[24] Attached to Capitol City's Further Opposition to Second Petition to Reopen the Record is a statement under penalty of perjury, dated April 28, 1993, from Ronald Patterson acknowledging that he lost his job in October 1990, that he was out of work until February 1993, when he was hired as Project Director of the Shreveport Minority Business Development Center in Shreveport, Louisiana. Immediately after securing employment, Patterson entered into an agreement with the Shreveport Consumer Credit Counseling Services on March 12, 1993 to coordinate the retirement of his financial obligations, including his tax obligations.

[25] Williams suggests that, by the act of certifying the applicant's financial qualifications, Ronald Patterson affirmed that his father had sufficient net *liquid* funds to meet his commitment to Capitol City. We disagree. To certify, Capitol City had to have reasonable assurance at that time of "sufficient net liquid assets on hand, or committed sources of funds to construct and operate for three months without revenue," as required by Form 301. See generally *Northampton*, 4 FCC Rcd at 5519 ¶ ¶ 15-16. Here Capitol City relies on a "committed source[] of funds" (i.e., Malvin Patterson). It may prevail on the false certification issue if it can show substantial and probative evidence on remand that at the time of certification Ronald Patterson had a good faith belief that the lender had the necessary financial resources -- whether in the form of liquid or non-liquid assets -- to meet his funding commitment to Capitol City.

[26] Deposition, at 132, 133-34.

for three months plus the additional amount required by Malvin's pledge to protect the station and its assts against seizure. Thus, according to Ronald Patterson's own definition of "net liquid assets" -- which did not expressly include real estate -- Malvin Patterson clearly did not have "sufficient net liquid assets" to provide the necessary funds for Capitol City.

21. Capitol City offers no explanation for Ronald Patterson's apparent lack of candor regarding these decisionally significant matters, other than the self-serving statement of Ronald Patterson that he was relying on real estate, even though such reliance is contrary to accepted accounting practice and he did not explicitly include real estate when he was asked at deposition to define "net liquid assets." An ALJ may conclude, after hearing all of the evidence, that there was no intentional misrepresentation and thus no basis for disqualifying Capitol City.[27] However, we are unable to make that determination based solely on Patterson's self-serving, uncorroborated written declaration, particularly given the fact that Patterson is a former bank president, who testified that he is generally knowledgeable about financial matters and had attended a workshop dealing with the Commission's financial requirements. Thus, there are substantial and material questions, which cannot be resolved based upon the pleadings before us, as to whether Capitol City falsely certified its financial qualifications and whether Ronald Patterson intentionally deceived the Commission concerning his father's ability to fund the application. As these matters bear on Capitol City's basic qualifications, we remand this proceeding for further hearings on financial qualifications, false certification and misrepresentation/lack of candor issues against Capitol City.

**ORDERS**

22. ACCORDINGLY, IT IS ORDERED That the Application for Review, filed April 12, 1993, by Matthew Williams IS DENIED to the extent reflected herein and IS DISMISSED in all other respects.

23. IT IS FURTHER ORDERED That the Petition for Leave to File Reply, filed September 1, 1993, by Capitol City Broadcasting Company IS GRANTED; and that the Reply of Capitol City Broadcasting Company, tendered for filing on September 1, 1993, IS ACCEPTED.

24. IT IS FURTHER ORDERED, That the Review Board's Decision IS MODIFIED to the extent reflected above, that the Second Petition to Reopen the Record, filed on April 14, 1993, by Williams IS GRANTED to the extent reflected herein and IS DISMISSED in all other respects, that the Motion for Extension of Time, filed on July 22, 1993, by Williams IS DISMISSED as moot, and that this proceeding IS REMANDED to an Administrative Law Judge for further hearings and the preparation of a Supplemental Initial Decision on the following issues:[28]

(a) To determine whether Capitol City was financially qualified to be a Commission licensee at the time of certification;

(b) To determine whether Capitol City is presently financially qualified to be a Commission licensee;

(c) To determine whether Capitol City falsely certified its financial qualifications to construct and operate its proposed FM station at Longview, Texas;

(d) To determine whether Capitol City made misrepresentations lacked candor before the Commission concerning its financial qualifications; and

(e) To determine whether, in light of the evidence adduced under the foregoing issues, Capitol City is qualified to be a Commission licensee.

25. IT IS FURTHER ORDERED, That the burden of proof SHALL BE UPON Capitol City Broadcasting.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[27] An intentional misrepresentation about matters of decisional significance is a basis for disqualification. See, e.g., *Las Americas Communications, Inc.*, 6 FCC Rcd 1507, 1510 ¶ 22 (1991) (misrepresentation issue added where the pleadings reflected a disturbing pattern of concealment and half-truths raising a substantial and material questions as to whether the applicant had breached its duty of candor). See generally, *RKO General v. FCC*, 670 F.2d 215 (D.C. Cir. 1981).

[28] Pursuant to the requirements of 47 C.F.R. § 1.229 (e) and the procedures set forth in *Hearing Reform Report and Order*, 6 FCC Rcd 157, 161 ¶ 30 (1990), reconsideration granted in part, 6 FCC Rcd 3403 (1991), we direct Williams to file a motion concerning discovery within 10 days from the release date of this memorandum opinion and order. Absent good cause, any such discovery shall be completed within 30 days of the ALJ's action on such motion.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

December 2, 1993

## COMMON CARRIER BUREAU SOLICITS COMMENTS REGARDING MODIFICATIONS AND IMPROVEMENTS TO THE ANNUAL ACCESS TARIFF REVIEW PLANS

**Comment Date: January 3, 1994**

To aid our review of the required annual revisions of the local exchange carriers' (LECs) interstate access tariffs, the Common Carrier Bureau has developed Tariff Review Plans (TRPs). TRPs specify certain information that LECs must file in a uniform format. In each of the last eight years, the Bureau has prepared TRPs, after consultation with the LECs and their customers, reflecting both the specific information needed in light of changes in relevant Commission rules and policies and the most effective and least burdensome methods of supplying this information. The TRPs developed through this process are subject to approval by the Office of Management and Budget in accordance with the provisions of the Paperwork Reduction Act, 44 U.S.C. §§ 3506 et seq.[1]

In preparation for the 1994 annual access tariff filings, scheduled to be filed on April 1, 1994, the Bureau is examining changes in the TRPs necessary to reflect recent rule changes, other relevant events, and our experience in using TRPs. One of the items potentially effecting the TRPs for the 1994 filings regards transport rate structure and pricing.[2] The Commission also adopted a new incentive plan for LECs subject to rate of return regulation.[3] This new regulatory option is based on historical cost and demand and requires a new TRP.

As we have in the past, the Bureau wishes to obtain the views and advice of customers and other interested persons in order to develop any needed modifications and improvements in the TRPs. In order to adopt final TRPs as far in advance of the annual access tariffs filing date as possible, and to enable the TRPs to produce the information needed by the Commission to conduct its review of the tariffs in accordance with the Communications Act, the Bureau has determined that an expedited and informal procedure would be most useful.

Interested persons wishing to express their views regarding modifications and improvements to the TRPs may do so by letter addressed to the Chief, Tariff Division, Common Carrier Bureau, Federal Communications Commission, 1919 M Street, N.W., Room 518, Washington, D.C. 20554. We invite comment on the form the TRPs should take both for carriers subject to price caps regulation and for carriers subject to the rate of return rules. We also solicit comment from the price caps carriers on any exogenous changes they plan to request, beyond those included in the 1993 annual access tariff filings. These comments should be received no later than January 3, 1994, to allow the Bureau an opportunity to consider them. No reply comments will be considered.

Copies of comments may be obtained from International Transcription Service (ITS). The comments are also available for public inspection and copying in Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact John Scott (202) 632-6312 of the Common Carrier Bureau, Tariff Division.

FEDERAL COMMUNICATIONS COMMISSION

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[1] The 1993 TRPs, adopted in Commission Requirements for Cost Support Material To Be Filed with 1993 Annual Access Tariffs, 8 FCC Rcd 1936 (1993), Order, bore OMB Approval Number 3060-0400.

[2] Transport Rate Structure and Pricing, CC Docket No. 91-213, Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 7006 (1992), *Recon.*, First Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 5370 (1993), *recon.*, Second Memorandum Opinion and Order on Reconsideration, FCC 93-403, *pets. for recon. pending, appeal dismissed sub nom. New England Tel. and Tel Co. v. FCC*, No. 93-1494 (D.C. Cir. Sept. 7, 1993).

[3] Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation, 8 FCC Rcd 4545 (1993).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

QVC NETWORK, INC. File Nos. BTCCT-931029KL - KR

For Commission Consent to
Interim Transfer of Control of
Paramount Communications Inc.

## MEMORANDUM OPINION AND ORDER

**Adopted: November 23, 1993; Released: November 23, 1993**

By the Commission:

1. QVC Network, Inc. (QVC) seeks to acquire control by an unsolicited tender offer of Paramount Communications Inc. (Paramount), which holds Commission licenses for broadcast facilities. Paramount is also the subject of a competing tender offer by Viacom Inc. (Viacom).[1] QVC filed a supplemented short-form application, FCC Form 316, with a request that the Commission grant a special temporary authorization (STA) to a trustee to enable him to acquire and vote, subject to certain restrictions, the shares obtained via the tender offer and to exercise control of Paramount's licensed facilities, should QVC prevail in the tender offer contest, during the interim period when QVC's qualifications are under consideration. QVC filed a long-form application, FCC Form 315, simultaneously with its STA request.[2] Viacom and the National Association for the Advancement of Colored People, in conjunction with the League of United Latin American Citizens (NAACP/LULAC), opposed QVC's request for STA[3] and QVC and G. William Miller, QVC's trustee-designate, responded.

### BACKGROUND

2. Paramount is a publicly and widely traded company which, in addition to the businesses of producing motion picture and television programming, publishing books and operating regional theme parks, holds Commission licenses for seven UHF television stations through its seven wholly owned subsidiaries. These are: WKBD, Channel 50 (Fox), Detroit, Michigan; KTXH, Channel 20 (Ind.), Houston, Texas; KRRT, Channel 35 (Fox), Kerrville, Texas; WDCA, Channel 20 (Ind.), Washington, D.C.; KTXA, Channel 21 (Ind.), Arlington, Texas; WTXF, Channel 29 (Fox), Philadelphia, Pennsylvania; and WLFL, Channel 22 (Fox), Raleigh, North Carolina.[4]

3. Over the past several years and during the summer of 1993, according to the separate Schedule 14D-1 materials filed with the Securities and Exchange Commission by QVC and Viacom,[5] principals of both entities had each individually discussed with Paramount officials the possibility of various types of business combinations between Paramount and their own company. On September 21, 1993, pursuant to an agreement and plan of merger approved by their respective boards, Paramount and Viacom filed a long-form application for consent to a transfer of control of the licensees of parent company Paramount. In response, QVC announced, on October 21, 1993, its intention to launch a tender offer for Paramount shares, formally commencing that offer on October 27, 1993. Unless extended, the QVC offer expires at midnight on December 1, 1993.[6] In the meantime, Viacom and Paramount amended their original agreement so as to accomplish their merger via tender offer. The Viacom tender offer commenced on October 25, 1993 and expires, unless extended, at midnight on November 24, 1993. QVC now seeks, in its supplemented short-form application, a STA for its designated trustee so that he may manage and operate the Paramount licensees pending review of the long-form application.

4. Section 310(d) of the Communications Act mandates that Commission consent be obtained prior to a transfer of control of licensed stations. QVC here invokes the Commission's two-step procedure for granting such control so as to expedite its hostile tender offer. The procedure, detailed in *Tender Offers and Proxy Contests (Tender Offers)*, 59 R.R. 2d 1536 (1986), *appeal dismissed sub nom. Office of Communication of the United Church of Christ v. FCC*, 826 F.2d 101 (D.C. Cir. 1987), and utilized in past tender offers involving target communications corporations, *see, e.g., CNCA Acquisition Corp.*, 3 F.C.C. Rcd 6088 (1988); *JB*

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[1] In an Order adopted today, the Commission also grants an STA to the trustee designated by Viacom so that Viacom, in the event it is the prevailing bidder, may have a mechanism in place to acquire Paramount shares pending Commission action on its long-form application.

[2] FCC File Nos. BTCCT-930921KE through KK.

[3] NAACP/LULAC supplemented their joint opposition on November 12, 1993 and submitted further comments on November 16, 1993. QVC responded to the comments on November 17, 1993. Although these two NAACP/LULAC pleadings were late-filed, we considered them in reaching our determination here. Thus, their accompanying motion for leave to file comments is rendered moot.

[4] Through its wholly owned Paramount Pictures Corporation (PPC), Paramount holds a 6.4565 percent, attributable interest in Combined Broadcasting, Inc. (Combined), licensee of television stations WGBS-TV, Philadelphia, Pennsylvania, WBFS-TV, Miami, Florida, and WGBO-TV, Joliet, Illinois. PPC's interest in Combined derived from its role as a creditor in a Chapter 11 reorganization. *See Paramount Communications, Inc.*, 7 F.C.C. Rcd 1390 (1992). Now pending before the Commission is an application, BTCCT-930818KE, seeking consent to the transfer of control of the licensee of WGBS-TV, Philadelphia, to FTS Philadelphia, Inc.

[5] The Securities and Exchange Commission rules require that a party making a tender offer for a publicly traded company file a Schedule 14D-1 with that agency. In addition to terms of the offer and information about the bidder and target company, the Schedule 14D-1 must include information regarding past contacts, transactions or negotiations with the target company, as well as identify the source and amount of funds to be utilized in financing the tender offer. *See* 17 C.F.R. §240.14d-100.

[6] The initial QVC tender offer was set to expire on November 24, 1993, but QVC's subsequent action increasing its offer price extended that date to November 26, 1993. However, as a result of litigation pending in the Delaware Chancery court, both QVC and Viacom agreed to extend their respective deadlines, QVC to December 1, 1993 and Viacom to November 24, 1993.

*Acquisition Corp.* (*JB Acquisition II*), 60 R.R. 2d 1207 (1986); *Macfadden Acquisition Corp.* (*Macfadden II*), 60 R.R. 2d 1066 (1986),[7] entails accelerated action in the first step, the bidder's short-form application which seeks grant of an STA to an independent trustee. In acting upon a STA request, the Commission defers examination of the bidder's qualifications to be a licensee until the long-form application review, confining its consideration at the first step to the trust instrument, the trustee's legal qualifications, and, if challenged, the bidder's ability to finance the tender offer. *See, e.g., Macfadden Acquisition Corp.* (*Macfadden I*), 104 F.C.C. 2d 545, 565-66 (1986). The STA would empower the trustee to collect and purchase tendered shares and to operate the corporation, subject to certain limitations.[8] Upon consummation of the tender offer, when the tendered shares are purchased, the Commission, in the second step, reviews the long-form application to determine whether the bidder is qualified to be a Commission licensee.[9] Pending our action in this second step, however, the bidder is proscribed from exercising control of the tendered stock and from attempting to influence the actions of the trustee. Only upon grant of the long-form application, therefore, may the bidder assume control of the licensee. If the Commission finds the bidder unqualified to be a licensee and denies the long-form application, the trustee alone must dispose of the target company's stock, setting the terms and consideration for that stock.

## APPLICABILITY OF THE STA MECHANISM

5. QVC is a publicly traded company providing a home-shopping programming service to cable systems. More than one-third of its voting stock is owned collectively by (1) Liberty Media Corporation (Liberty), a cable television system operator and programming provider, (2) Comcast Corporation (Comcast), a cable television system and cellular telephone system operator, and (3) Arrow Investments, L.P. On October 7, 1993, Liberty and Tele-Communications, Inc. (TCI), according to QVC's Schedule 14D-1, signed a letter of intent to combine their businesses and soon thereafter, Liberty, TCI and Bell Atlantic Corporation announced that they had signed a letter of intent setting the terms and conditions upon which the three parties proposed to negotiate a combination of their businesses. However, on November 11, 1993, according to Amendment No. 6 of QVC's Schedule 14D-1, Liberty and TCI entered into an agreement with the Federal Trade Commission to divest all ownership in QVC in the event QVC consummates its acquisition of Paramount.[10] Replacing Liberty as one of QVC's three largest shareholders will be BellSouth Corporation (BellSouth), which has agreed to invest $1.5 billion in QVC stock. Further, in the event QVC prevails in the tender offer contest and consummates the merger, Cox Enterprises, Inc. (Cox), which holds Commission licenses and operates cable television systems, and Advance Publications, Inc. (Advance), which also operates cable television systems and publishes daily newspapers, will each purchase a large block of QVC equity. A merger of Paramount, with its seven television stations, and QVC, with its attributable voting shareholders and principals owning attributable interests in various television stations, cable systems and daily newspapers in the Paramount markets, could result in numerous potential conflicts with the Commission's multiple ownership rules and cross-interest policies.[11] Consequently, QVC has stated, in its long-form application and Schedule 14D-1, that following consummation of the tender offer and Commission approval of its long-form application it will divest all seven television stations licensed to Paramount's subsidiaries. QVC seeks, therefore, a temporary, 18-month waiver of the Commission rules and a delay in enforcement of the statutory cable-broadcast cross-ownership prohibition implicated in the merger with Paramount.

6. Both Viacom and NAACP/LULAC argue that QVC's proposal to divest the Paramount stations disqualifies it from employing the STA mechanism. Commission grant of a STA to QVC, they argue, would "facilitate" the acquisition of broadcast stations by QVC, an "admittedly unqualified purchaser." Trustee procedures, Viacom adds, should be available for those qualified parties which seek to operate stations, not unqualified parties which seek to dispose of them. And, NAACP/LULAC contend, the Commission's long-standing policies against trafficking in broadcast station licenses precludes the use of the STA, which would permit QVC to acquire stations it only intends to divest within 18 months. QVC, Viacom insists, will orchestrate the sale of the stations to a buyer which poses the least competitive threat to the cable systems or other communications facilities of its principals. And even if the Commission were to grant QVC's trustee a STA and ultimately deny its long-form application, NAACP/LULAC question the independence of the trustee in selecting a buyer for Paramount, arguing that he is likely to sell the company to a buyer which is related to QVC and the "pervasive interests" of its principals.

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[7] The two-step procedure was employed prior to Commission adoption of *Tender Offers*, in *L.P. Media, Inc.*, 102 F.C.C. 2d 1276 (1985), and in *One Two Corp.*, 58 R.R. 2d 924 (1985).

[8] The Commission is empowered under Section 309(f) of the Act to authorize STAs in cases where there are "extraordinary circumstances" requiring temporary operations in the public interest. We have concluded that cases involving tender offers of a communications corporation, such as are involved here, warrant such Commission action. *Tender Offers*, 59 R.R. 2d at 1568-78.

[9] The second step is governed by the formal procedures specified in Section 309(d) of the Act.

[10] Specifically, according to Amendment No. 6, Liberty and TCI entered into an Agreement Containing Consent Order with the staff of the Federal Trade Commission (FTC) and an Interim Agreement with the FTC general counsel. The consent order agreement was accepted for public comment by the FTC on November 15, 1993. Pursuant to the consent order, if QVC consummates the Paramount acquisition, Liberty and TCI will divest their entire ownership in QVC within 18 months of the date the FTC consent order becomes final. Moreover, pursuant to the consent order, for a period of three years after the Liberty and TCI divestitures, Liberty and TCI will cease and desist from acquiring, directly or indirectly, without prior FTC approval any equity or other ownership interest in QVC, Paramount or USA Network, a joint venture between Paramount and MCA, Inc. Until the FTC approves the consent order and until divestiture is complete, Liberty and TCI are prohibited under the interim agreement from exercising direction of or control over the operations or management of QVC or Paramount or from exercising any voting rights or agreements. In addition, under the interim agreement, Liberty and TCI officers, directors or employees who are also current members of the boards of directors of QVC or Paramount must resign.

[11] For a list of these potential conflicts, see Exhibit 5 of QVC's long-form application.

7. *Discussion.* The question before us is whether permitting QVC to employ the STA mechanism, in light of its intended divestiture of the Paramount stations, would be in the public interest. It is settled that in reaching its public interest determination, the Commission must attempt to accommodate, to the extent possible under the Communications Act, other federal policies. *See, e.g., National Broadcasting Co. v. United States*, 319 U.S. 190, 222-23 (1943)(Commission should consider purposes of Sherman Act in administering its regulatory powers); *Storer Communications, Inc. v. FCC*, 763 F.2d 436, 443 (D.C. Cir. 1985)(Commission must attempt to implement the Communications Act in a manner as consistent as possible with corporate and federal security laws' protection of shareholders' rights); *LaRose v. FCC*, 494 F.2d 1145, 1146-47 n.2 (D.C. Cir. 1974)(Commission should endeavor to reconcile Communications Act and federal bankruptcy law). Indeed, our tender offer policy was designed to harmonize the Communications Act with the purposes underlying the Williams Act,[12] the provision of the Securities and Exchange Act governing tender offers. *Tender Offers*, 59 R.R. 2d at 1555-62. Thus, it was in acknowledgment of Congress' express intent to promote a policy of neutrality in tender offers that the Commission fashioned the two-step procedure. *Id.* By eliminating the delay inherent in the long-form process, the Commission reasoned, shareholders would not be reluctant to tie up their assets by tendering shares and incumbent management would not be able to frustrate a pending tender offer utilizing Commission processes. *Id.*

8. Here, QVC's commencement of a tender offer for Paramount is apparently not driven by its desire to acquire the Paramount television stations but rather by its attraction to the Paramount businesses not licensed by the Commission. Viacom and NAACP/LULAC, in essence, ask that we flatly prohibit use of our STA procedure by tender offerors lawfully seeking to gain ownership of a company primarily for its nonbroadcasting enterprises. We decline; to do so would be to sanction a formidable takeover defense weapon. As the Commission has observed, a recognized tactic in defending against a takeover bid of a nonbroadcast company is the purchase of a radio or television station so as to tie up the takeover attempt in administrative proceedings. *Tender Offers*, 59 R.R. 2d at 1561 n.114(*citing* T. Hazen, *Securities Regulation*, 11.20 at 381 (1985); Hochman and Folger, "Deflecting Takeovers: Charter and Bylaw Techniques," 34 *Bus. Law* 537, 558 n.60 (1979)). Thus, arming incumbent management with this weapon of delay, we noted, "effectively deprive[s] shareholders of communications entities of options that would otherwise exist in the marketplace" and is "detrimental to the public interest." *Id.* at 1561. Thus, not only would shareholders suffer were we to deny our two-step procedure to bidders seeking to divest the broadcasting assets of a target company, but economically beneficial business combinations involving the divestiture of even the sole broadcast station involved could be thwarted. Accordingly, we find that QVC's stated intention to divest the Paramount television stations does not preclude its invocation of the STA mechanism.

9. Although we stated in *JB Acquisition Corp.* (*JB Acquisition I*), 60 R.R. 2d 1095, 1103 n.12 (1986), that the Commission would not waste resources in acting upon a STA request where it is "clearly shown" that an offeror's qualifications are lacking, we note that here, the petitioners propound no factual basis for, and cite no Commission precedent in support of, their proposed tenet that an applicant's stated intention to divest all broadcast stations acquired in the acquisition of a multi-faceted corporation renders that applicant unqualified.[13] In contrast, the Commission has observed that the purchase and rapid resale of broadcast facilities "is not per se contrary to the public interest." *Transfer of Broadcast Facilities*, 52 R.R. 2d 1081, 1088 (1982).[14] Such a short-term licensee, we added, provides a "caretaker service" until a more permanent licensee is ready, willing or able to buy the stations. *Id.* Furthermore, we have facilitated major mergers of corporations each owning several media interests, many of which conflict with our multiple ownership rules. Rather than prohibiting the business combination to go forward, we have permitted the consummation of the business combinations, granting the necessary waivers for a temporary period in order to allow orderly divestiture of the noncomplying media outlets. *See, e.g., Golden West Associates, L.P.*, 59 R.R. 2d 125 (1985)(cable-broadcast and newspaper-broadcast cross-ownership rules); *Storer Communications, Inc.*, 59 R.R. 2d 611 (1985)(television duopoly, cable-broadcast cross-ownership); *Capital Cities Communications, Inc.*, 59 R.R. 2d 451 (1985)(television duopoly, one-to-a-market, cable-broadcast and newspaper-broadcast cross-ownership). We believe this policy is equally appropriate for proposed mergers, such as this one, in which the bidder seeks to acquire the nonbroadcast assets of a company but wishes to spin off the licensed stations. Finally, the petitioners concerns' regarding the ultimate assignee of the Paramount stations should be assuaged in that our prior approval must be obtained before any proposed transaction is consummated. At that stage, petitioners are afforded the opportunity to examine, and articulate any opposition to, the proposed transferee. We then shall consider all relevant and specific allegations raised.

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[12] The Williams Act is codified as part of the Securities and Exchange Act, 15 U.S.C. §§78m(d)-(e), 78n(d)-(f).

[13] NAACP/LULAC intimate, citing *Cablevision VI, Inc.*, 5 F.C.C. Rcd 7166 (1990), that QVC must be disqualified at the outset because of Section 613(a) of the Act, the prohibition on cross-ownership of cable television and broadcast stations, which the Commission lacks authority to permanently waive. While it is true the Commission cannot grant permanent waivers of the statutory prohibition, we also noted in *Cablevision VI, Inc.*, 5 F.C.C. Rcd at 7166, that the Commission has, in the past, delayed enforcement for a temporary period to "accommodate the exigencies of the marketplace." *See Golden West Associates, L.P.*, 59 R.R. 2d 125 (1985). Accordingly, QVC's request for delay of enforcement for an 18-month period does not necessarily disqualify it from grant of its long-form application. However, we reach no determination at this time as to whether affording QVC such a period would serve the public interest.

[14] The Commission's elimination of the trafficking policy, therefore, renders moot the argument of NAACP/LULAC, that QVC's proposed divestiture would violate such a policy. *See also Office of Communication of the United Church of Christ and Action for Children's Television v. FCC*, 68 RR 2d 59 (D.C. Cir. 1990).

### VOTING TRUST AGREEMENT

10. QVC seeks to acquire control of, and the entire equity interest in, Paramount through a two-tiered offer to Paramount shareholders: first, a revised all-cash tender offer for, and purchase of, 51 percent of Paramount stock at $90 per share, followed by the "second-step merger," the conversion of the remaining 49 percent of Paramount stock issued and outstanding into the right to receive QVC stock.[15] The cash portion of the tender offer totals approximately $5.49 billion. All shares acquired by QVC in its tender offer, or by any other means,[16] will be simultaneously transferred and delivered to the trustee, according to the terms of a voting trust agreement executed by QVC and its designated trustee, G. William Miller. During Commission review of QVC's long-form application, the trustee will hold the legal title and all voting rights to any QVC-held shares, while QVC will own the equitable interest in those shares, entitling it to receive dividends and other distributions other than Paramount securities. However, the trustee must exercise his votes in a manner so as to facilitate QVC's tender offer, to oppose any proposals in conflict with consummation of the tender offer, and to maintain the current management and operations of Paramount. With regard to the last duty, the trustee may elect or appoint directors, including himself, if he so chooses, constituting a minority of the Paramount board, unless the removal and replacement of a director is necessitated by a director's "opposing, impeding or impairing" the effectuation of QVC's tender offer or wasting of corporate assets. A replacement director, according to the trust, must bear a relationship to QVC as strict as that of the trustee to QVC, that is, having no business or familial connections with QVC or any of its officers, employees, directors, shareholders or affiliates. Communications permitted between trustee-appointed directors and QVC, under the trust provisions, also parallel those allowed between the trustee and QVC: one-way written communications to QVC concerning the management and operations of Paramount and two-way communications, to and from QVC, concerning the mechanics of implementing the tender offer.

11. The rights and duties of the trustee, who is to be compensated by QVC for his services, terminate upon his incapacity, death or insolvency. If such circumstances occur, or the trustee resigns by giving QVC 60 days' advance written notice, he will be succeeded, subject to prior Commission approval, by a successor trustee chosen by QVC. Further, the voting trust agreement, expressly irrevocable pending Commission review of QVC's long-form application, will terminate upon the first to occur of the following: (1) five years from the execution of the trust agreement; (2) the transfer of shares to QVC subsequent to Commission approval; or (3) the sale of all stock or assets to a third party. As to the sale of stock, the trust agreement provides that in the event QVC notifies the trustee in writing during the pendency of the applications of its desire to sell the acquired shares and the trustee "fails to disapprove such decision to sell," the trustee must sell the Paramount shares "in such manner as will maximize the proceeds" to QVC. In this voluntary sale, although the trustee selects the purchasing party or parties and defines the terms of such sale, QVC may withdraw its request to sell at any time prior to consummation of the sale, "subject to the independent concurrence of the Trustee with such withdrawal." Conversely, if the sale is involuntary, meaning the Commission has denied a transfer of control of the Paramount stock to QVC or the trustee is required by law to sell the shares, the trustee, according to the trust agreement, retains discretion to select the sale terms, with the continued obligation of maximizing the proceeds, but QVC has no authority to interpose a veto to that sale. Finally, the agreement provides that the trust instrument cannot be amended, altered or modified except in writing and signed by both QVC and the trustee. Substantial changes are to be made "only as required or approved by FCC order" and a copy of any insubstantial change is to be filed with the Commission within 10 days after such changes are executed.

12. No provision of the QVC trust instrument has been challenged. After reviewing the agreement, we conclude that all of its terms are in compliance with Commission policy governing trusts in tender offer cases.

### ELIGIBILITY OF TRUSTEE

13. G. William Miller, a United States citizen, is a former Secretary of the Treasury and Chairman of the Board of Governors of the Federal Reserve System. His current principal activity is as chairman of G. William Miller & Co., Inc. He has, according to Exhibit B of QVC's request for STA, no direct or indirect familial or business relationship with QVC or any of its subsidiaries or affiliates. Nor does he hold any media interests or has he been the subject of any adverse finding by any court or administrative body with respect to any felony, serious misdemeanor, mass media-related antitrust or unfair competition, fraudulent statements to another governmental unit, or discrimination. Moreover, Miller, the QVC STA request points out, was previously found to be qualified to serve as a trustee in *L.P. Media, Inc.*, 102 F.C.C. 2d 1276 (1985), an earlier two-step tender offer case.

14. *Viacom's opposition.* Prior to entering a trust agreement with QVC, according to a declaration submitted by Viacom's communications counsel George H. Shapiro, Miller entered into discussions with Viacom, through Shapiro, regarding the possibility of Miller acting as trustee for Viacom pending review of its long-form application. Based upon information gleaned from Miller in connection with those discussions, Viacom assails the qualifications of Miller on two grounds. First, Viacom alleges that QVC would wield influence over the trustee based upon his role in Agricole Limited (Agricole), a corporation indebted on a note payable to Paramount, and ultimately to QVC, should it prevail in the bidding contest and complete its merger. Specifically, as noted by Miller in information he dispatched to Shapiro in preparation for the Viacom STA request,[17] prior to 1979, Paramount owned a soybean farm

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[15] Each remaining share of Paramount stock will be converted into 1.43 shares of QVC common stock and 0.32 shares of a new series of cumulative convertible exchangeable preferred stock. QVC's original tender offer price was $80 per share for 51% of the shares, with the remaining stock to be converted to 1.43 shares of QVC common stock.

[16] According to the Schedule 14D-1 filed with the Securities and Exchange Commission in connection with the tender offer, QVC owns 1,000 shares of Paramount stock while Liberty, Comcast and BellSouth currently own no Paramount stock.

[17] In his declaration, Shapiro states that he prepared a draft statement for Miller, based upon their prior conversations, for

in Paraguay.[18] Management and ownership of that farm was assumed by a Paramount subsidiary and Netherlands Antilles company, Aros, N.V. (Aros), which entered into a partnership with TAG Agri-Development Ltd., a wholly owned subsidiary of TAG Group S.A. (TAG), a Luxembourg corporation owned, in turn, by a family whose members are not U.S. citizens. In consolidating its businesses into communications-related fields, Paramount's Aros assigned its partnership interest in 1984 to Agricole, a newly created, wholly owned, Cayman Islands-incorporated subsidiary of TAG. Miller is a vice president and director of Agricole, but holds no ownership interests in the company. As consideration for the partnership interest, Agricole delivered an $8 million promissory note payable to Aros and guaranteed by its parent, TAG, but no scheduled payments have been made since 1990. The note, whose balance as of July 1993 was approximately $5.8 million, is due in January 1994. Negotiations toward formal resolution of the note between Paramount senior counsel Daniel Victor and Miller occurred as recently as September 17, 1993, as evidenced by copies of letters between the two men, submitted by Victor in support of the Viacom opposition.[19]

15. Miller is also president and director of TAG Group USA, Inc. (TAG USA), a wholly owned U.S. subsidiary of TAG but with no interests in Agricole. Additionally, Miller and his firm, G. William Miller & Co., based on his statement to Viacom, apparently provide management services to TAG USA as well as to its subsidiaries and affiliates. Miller and his firm, he represented to Viacom, earn "a flat annual fee" for those services and compensation is not tied to the financial performance of any of the TAG companies. Nor, he stated to Viacom, will he or his firm receive any "financial reward or other benefit" for resolving the Agricole note matter. The corporate letterhead used by Miller for the several pieces of correspondence to Paramount's Victor were that of G. William Miller & Co. and of TAG USA, suggesting that Miller utilized his consultant position and his role as an officer and director of TAG USA in negotiating a workout of the Agricole debt. Those letters also reveal that Miller apparently was negotiating on behalf of not only Agricole, but of TAG, the parent company of both Agricole and TAG USA.

16. Viacom maintains that in the event QVC's tender offer is consummated, Paramount would subsequently merge into QVC, making the note then payable to QVC or its new subsidiary. This relationship would undermine Miller's independence from QVC: If QVC is "pleased" with the way in which its trustee Miller performs his duties, Viacom contends, it may act favorably on the note, thereby enhancing not his financial fortunes, but Miller's status in his company and with his clients. Consequently, Viacom asserts, during his trusteeship Miller would have an incentive to "ingratiate himself" to QVC by "anticipating and advancing its business interests," thereby abandoning the independence he is required to exercise as interim trustee. Second, Viacom argues that Miller's personal involvement in negotiations on behalf of TAG and Agricole, as well as his positional interests in Agricole and in TAG USA, a domestic subsidiary of Luxembourg company TAG, render him a "representative" of an alien. He is therefore precluded, Viacom asserts, from service as QVC's trustee under Section 310(b) of the Act. Moreover, Viacom contends, Miller's directorship on the board of Gulf Canada Resources Limited (Gulf Canada), a Canadian corporation, "clearly expands" his role as a representative of aliens.

17. *QVC's and Miller's replies.* QVC and Miller do not dispute the factual segments of Viacom's argument. However, they separately argue that Commission policy, as described in *Tender Offers*, forbids business and familial relationships between the trustee and bidder, not between the trustee and the target company. Taken to its extreme, Viacom's argument, QVC and Miller claim, would render every bidder's designate unqualified to serve as trustee because she or he may hope to gain a bonus or a paid position with the new entity subsequent to the merger. As posed by Viacom, Miller argues, that the only conflict of interest between Miller and QVC is one based upon "pure speculation" and focuses on what QVC may do after the merger. The Commission's only concern, Miller notes, "is with the behavior of the offeror and the trustee during the long form review period." However, in order to "offset any lingering question" and out of an "abundance of caution," Miller declares that he has, since QVC filed its STA request, excluded himself from any involvement on behalf of, and relating to, the Agricole note and will insulate himself from discussions related to that matter. He notes that he will continue to do so through the trusteeship term. And, if requested by the Commission, Miller states he will resign as vice president and director of Agricole and will take "any other steps deemed necessary or appropriate" in connection with his association to Agricole. Even if not asked to resign, Miller adds that his insulation from all note-related activity, as well as the lack of financial or other benefit attached to the note, make him an independent trustee. As to violating Section 310(b) of the Act, Miller argues that a person's business connection to, or relationship with, an alien does not transform that person into a "representative" of an alien under the Act when that person acts in his or her individual capacity as trustee.

18. *Discussion.* In evaluating allegations that a proposed trustee does not comply with our policy, we are guided by three broad principles governing interim trusteeships in tender offer cases: (1) that the bidder be prevented from exercising direct or indirect control or influence over the operation and management of a licensee prior to our approval of the bidder's long-form applications, *Tender Offers*, 59 R.R. 2d at 1578; (2) that the trustee act independently, *id.* at 1579; and (3) that the trustee's role and accompanying powers be circumscribed to those befit-

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inclusion in a Form 316 in the event Viacom decided to employ Miller as its trustee. Miller revised that draft, Shapiro declares, making corrections pertaining to his relationships with the company and indicating his willingness to exclude himself from any discussion, consideration or action involving the Agricole note. A copy of Miller's edited statement, according to Shapiro, was sent by facsimile to Shapiro on October 25, 1993. Later that day, Shapiro noted, Viacom elected to terminate discussions with Miller. Miller's statement to Viacom is attached as Exhibit 1 to Viacom's petition to deny.

[18] The farm was initially owned, according to Miller, under Paramount's former corporate name, Gulf + Western Industries, Inc. For purposes of this discussion, we will refer to Gulf + Western as Paramount.

[19] Those letters, as well as a declaration by Victor, are attached to Viacom's opposition as Exhibit 2.

ting a conservator or caretaker. *Id.* at 1581. While it is true, as observed by QVC and Miller, that the Commission in *Tender Offers* expressly proscribed familial and business relationships between the trustee and bidder, those restrictions must be read in their proper context. The Commission established the standards for trustee-bidder insulation to promote the first and second objectives above: to limit the bidder's direct or indirect influence over the management of the target company, particularly by means of its influence over the trustee. *Id.* at 1577-78. To that end, the Commission in 1986, when it adopted the tender offer policy, attempted to set parameters within which the trustee and bidder were permitted to operate, listing specific forbidden acts of the bidder, *id.* at 1578-79, and forbidden relationships between the bidder and the trustee. *Id.* at 1579-81. But in formulating that policy and setting those boundaries, the Commission did not have before it the benefit of every conceivable permutation of trustee conduct relationship, and the list of proscriptions in *Tender Offers* was not intended to be exclusive. Accordingly, our practice since *Tender Offers* has been to examine on an *ad hoc* basis the circumstances before us against the backdrop of the overarching principles underlying that policy.[20]

19. Now before us for examination is trustee-designate Miller who has, until quite recently, been negotiating payment restructuring for debt owed to a Paramount subsidiary by Agricole, of which he is officer and director. That note is guaranteed by TAG, for whom Miller apparently served as consultant via his firm, G. William Miller & Co., Inc., and via TAG USA, a TAG U.S. subsidiary of which Miller is president and director. Although payable to a subsidiary of the target company, Paramount itself, through its general counsel, has been negotiating the terms of the debt. It is true, as QVC and Miller contend, that Miller's several positions are devoid of direct familial or business ties to QVC. Yet, these same ties constitute direct and indirect business relationship to Paramount through the TAG entities. Although we have not had the occasion in the past to address such trustee links to the target company, we believe that they, like trustee-bidder connections, threaten the inviolability of the three principles discussed above, particularly in this case, where a trustee's loyalties would be inherently divided between a debtor and its creditor. Indeed, Miller's employment with the TAG companies bears duties and obligations that are irreconcilably divergent from those we impose on a trustee. As an employee and consultant to the TAG companies, Miller is obligated to pursue payment schedules and amendments to the note and guaranty that benefit those entities. And as trustee, Miller must serve as Paramount's conservator and caretaker, preserving its assets, including those owed to it by the TAG companies. Moreover, as trustee, Miller must have the ability to act independently, free of any and all competing influences and interests. Such influences could conceivably extend to those of QVC, as the soon-to-be parent company of Paramount, which would accede to the creditor rights and powers Paramount now holds over the TAG companies.[21] This arrangement is, therefore, at variance with the strict structural insulation of trustees sought by our tender offer policy and attendant requirements.

20. In sum, we do not intend to impugn the integrity of either Miller or QVC, but we believe that it is preferable in all Commission-approved trusts that any relationship be severed that may serve as a palpable catalyst for impairing the trustee's independence, be they between trustee and bidder or between trustee and target. Further, although stated in another context, we continue to believe that the likelihood of trustee insulation and independence "is considerably enhanced" when the trustee "has no history of personal contact" with those parties creating a conflict of interest. *Macfadden II*, 60 R.R. 2d at 878. Here, the root causes of Miller's potential conflicts are his sundry connections to the outstanding note payable to Paramount. We believe that a trustee-designate which has been, and is currently, involved in some fashion with an as yet unresolved creditor-debtor situation with the target company must abdicate all of his or her positions which create a conflict of interest with the target company-payee and a potential conflict with the bidder, the payee's successor. Therefore, Miller's vice presidency and directorship of Agricole, the payor of the note to Paramount, establish such a conflict and he must resign those posts. Additionally, Miller's apparent use of his presidency and directorship of TAG USA, which is wholly owned by TAG, the note's guarantor, to negotiate on behalf of Agricole and TAG, pose similar conflicts. Therefore, he must also relinquish those positions. Further, Miller, must continue refraining from all note-related consulting and legal work for Agricole and the TAG companies, and he must cease working with those entities as a consultant in all other matters. Nor may any member of Miller's firm act where we now proscribe him from so acting. Accordingly, we find Miller otherwise qualified to serve as trustee and shall condition grant of QVC's STA request on his taking these corrective actions.

21. Finally, Viacom's concern that Miller's service as a trustee of a Commission licensee would violate the alien ownership prohibitions of Section 310(b)(1) of the Act is without merit. Section 310(b)(1) states that no broadcast license shall be granted to or held by "any alien or the representative of any alien." The Act does not define "representative" and the legislative history is silent as to the meaning of that term. However, in *Russell G. Simpson, Esq.*, 2 F.C.C. 2d 640 (1966), the Commission was asked to determine whether an honorary consul for the Republic of Bolivia in Boston, Massachusetts, a U.S. citizen, could be granted a license to operate a radio station in the Citizens

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[20] *See, e.g., CNCA Acquisition Corp.*, 3 F.C.C. Rcd at 6090-91 (financial and communications restrictions imposed on trustee with regard to his law firm even though trustee at the time was only "of counsel" to the law firm and the law firm's representation of a client which had owned some of bidder's stock had already terminated); *JB Acquisition Corp. I*, 60 R.R. 2d at 1101 (target company prohibited from engaging in business relationship with Drexel Burnham Lambert, Inc., an investment banker once utilized by target and now employed by bidder, so as to "forestall the possibility of any indirect influence over a subsequently proposed trustee(s) by even partial owners of the takeover company); *Macfadden II*, 60 R.R. 2d at 878-79 (financial and communications restrictions placed upon the trustee with regard to his law firm, which had represented clients with ongoing interests in the bidder).

[21] Such powers include the vetoing of proposed debt schedules, the forgiving of portions of debt or interest, and the filing in court of a claim for breach. Indeed, we note that July 21, 1993 correspondence from Paramount's general counsel Victor to Miller indicated the company's willingness to pursue a lawsuit on the Agricole note in the event a certain condition had not been met.

Radio Service.[22] The consul's uncompensated duties primarily entailed validating shipping documents and issuing tourist cards to those visiting Bolivia. Use of the stations, the consul represented, would be for his "own purposes" and not "in behalf of" the Bolivian government or "in connection with" his consular activities. The Commission, in granting the honorary consul the license, concluded that he was not a "representative" of a foreign government within the meaning of Section 310 of the Act. Here, because we are requiring that Miller relinquish his positions at Agricole and TAG USA and his representation of TAG, we need not assess whether he functions in those contexts as a representative of alien corporations. Remaining for our determination, therefore, is his directorship of Gulf Canada, a Canadian gas and oil company. Assuming arguendo, that Section 310(b)(1) was intended to address the potential interests of foreign corporations in licensed activities,[23] Miller has represented that neither Gulf Canada nor its affiliates are involved in the communications industry. Thus, we are persuaded that Miller will not serve as a trustee "in behalf of" or "in connection with" his activities at Gulf Canada. For similar reasons, no issue arises, nor is there any evidence, that the trustee's relationship to Gulf Canada will have any impact on his independence in operating and managing the stations. *See Noe v. FCC*, 260 F.2d 739, 741 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 924 (1959). We do not believe it was Congress' intention to broadly exclude from eligibility for holding a Commission broadcast authorization any and all United States citizens who perform some work for an alien citizen or foreign corporation in a capacity wholly unrelated to the business and broadcast activities for which the authorization is sought. Accordingly, we find that Miller is in compliance with Section 310 of the Act.

## TRUSTEE'S/BIDDER'S FINANCIAL QUALIFICATIONS

22. *Oppositions.* A substantial part of the oppositions, as well as of the November 16, 1993 comments, filed by NAACP/LULAC centers on the fitness of QVC to be a licensee. Those allegations focus largely on QVC's equity holders, Liberty and TCI, primarily in connection with their alleged EEO and anticompetitive conduct. We note, as discussed above, that it is Commission policy in tender offer cases to defer consideration of the bidder's qualifications until the long-form application phase of the procedure. *See, e.g., Macfadden II*, 60 R.R. 2d at 880; *Macfadden I*, 104 F.C.C. 2d 545, 565-66 (1986); *L.P. Media, Inc.*, 102 F.C.C. 2d at 1286. To do otherwise would undermine our primary aim in devising the two-step process, governmental neutrality through eliminating regulatory delay. *Tender Offers*, 60 R.R. 2d at 1557. Thus, the scope of review at the first step, the STA request, is limited to the trust agreement's compliance with Commission requirements and to the qualifications of the trustee. *Macfadden I*, 104 F.C.C. 2d at 565; *L.P. Media, Inc.*, 102 F.C.C. 2d at 1286. However, because the financing needed to consummate the acquisition of the target corporation is to be arranged by the bidder, and not the trustee, it is relevant to our public interest finding in granting temporary control to a trustee that the ultimate proposed transferee be financially qualified. *Macfadden I*, 104 F.C.C. 2d at 565-66. Thus, we shall limit the assessment of QVC's qualifications to be a Commission licensee to the financial component of that analysis, reserving scrutiny of allegations[24] raised here by NAACP/LULAC to our review of QVC's long-form application.

23. All proposed transferees, before their applications can be granted, must certify that there is sufficient capital to consummate the transaction at the closing and to meet expenses for three months. *Financial Qualifications Standard*, 87 F.C.C. 2d 200 (1981). However, when the application contains financial information, as does QVC's, because of the Securities and Exchange Commission-required tender offer materials submitted in this proceeding, we must also review the portions of that financial record which are challenged. *Macfadden II*, 60 R.R. 2d at 881. Here, QVC made the required financial certification on its long-form application that it has available the funds required to consummate the tender offer, now totaling approximately $5.5 billion. But Viacom contends that QVC lacks the financial qualifications required for grant of its STA request. First, one-half of the $2 billion equity portion of QVC's funding, Viacom asserts, remains dubious. Two of the four proposed equity investors, Cox and Advance, which have each pledged $500 million,[25] had not, as of October 26, 1993, according to QVC's Schedule 14D 1, submitted antitrust information to the Department of Justice and the FTC for approval of their purchase of QVC stock.[26] The equity investments of Cox and Advance,

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[22] Prior to 1974, when the Communications Act of 1934 was amended to remove stations in the Citizens Radio Service from alien ownership limitations, *see* House Report No. 93-1423, 1974 U.S. Code Cong. and Adm. News, 6306, the Commission was statutorily prohibited from granting any radio station license, except for aeronautical and amateur radio licenses, to an alien or "the representative of any alien." Thus, the Commission's decision in *Russell G. Simpson, Esq.* is valid for broadcast facilities today, which remain subject to alien ownership restrictions once also imposed on the Citizens Radio Service.

[23] We note that Sections 310(b)(2), (3), and (4) expressly address proscriptions on foreign corporations' involvement in broadcast licensees.

[24] We have not, therefore, detailed the allegations of NAACP/LULAC in connection with QVC's qualifications.

[25] The other two equity investors are Liberty and Comcast, each also pledging to invest $500 million. However, BellSouth, according to Amendment No. 6 of QVC's Schedule 14D-1, proposes to replace Liberty as an equity investor, pledging to invest $500 million. NAACP/LULAC, in their November 16, 1993 comments, contend that BellSouth's investment is also subject to antitrust clearance under Hart-Scott-Rodino. In this regard, our decision reached below on this matter as to the Cox and Advance investment commitments, applies with equal force to BellSouth. Moreover, we note that in the event the tender offer is consummated prior to BellSouth's antitrust clearance, QVC has represented in Amendment No. 6 to its Schedule 14D-1 that it will seek a bridge loan for the amount BellSouth has pledged. And, BellSouth, in a November 19, 1993 letter to QVC, attached as Exhibit (c)(16) to Amendment No. 10 to QVC's Schedule 14D-1, provided an alternative means of advancing all monies it has pledged to invest in QVC, including the $500 million equity investment, in the event it cannot purchase QVC equity securities prior to consummation of the tender offer. To that end, BellSouth, according to its commitment letter, will purchase $1.5 billion in new stock issued by a newly ' formed, wholly owned subsidiary of QVC, which will, in turn, lend proceeds from the BellSouth purchase to QVC on terms and conditions satisfactory to BellSouth.

[26] Under the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. §18a, also known as Section 7A of the Clayton Act, parties to certain mergers or acquisitions must notify the De-

QVC's Schedule 14D-1 indicated, were conditioned upon the receipt of "necessary regulatory approvals," including such antitrust clearance. Viacom maintains that not only have Cox and Advance not yet received that approval, but QVC itself has failed to secure such clearance with respect to its tender offer for Paramount. Second, Viacom argues that the $3 billion bank-financed portion of QVC's purchase monies also lacks certainty. While QVC attached commitment letters dated September 30, 1993 to its Schedule 14D-1, Viacom contends that those commitments were made in connection with QVC's pre-tender offer bid to merge with Paramount. In fact, Viacom maintains, QVC's own tender offer materials indicate that those commitments do not extend to QVC's tender offer. Because it lacks the antitrust approvals and financial commitments needed to consummate its offer, Viacom urges, QVC has failed to demonstrate that it is a qualified applicant and its STA request should be dismissed as patently defective.

24. *QVC's reply.* QVC states that not only did Cox and Advance file their antitrust materials on November 1, 1993, but the six banks in its syndicate have submitted letters dated subsequent to its commencement of the tender offer, attached as Exhibit A to QVC's reply. Those letters, according to QVC, evidence that the banks have a "present firm intention" to provide the funds for use by QVC in consummating the tender offer. And such intentions, QVC argues, are sufficient to meet the Commission's financial requirements.

25. *Discussion.* An applicant may establish that it has "reasonable assurance" of committed funding by providing the Commission with a letter it has received from a lender, signed by an official of that lender, and indicating the lender's willingness to furnish the applicant a specific amount of funds toward the proposed transaction. *Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117, 1120 (D.C. Cir.1978). With respect to QVC's equity financing of the tender offer, we note that the separate $500 million equity investments of Cox and Advance are predicated upon a letter agreement, a copy of which is included as Exhibit (c)(1) in QVC's Schedule 14D-1. Entered into on October 15, 1993, the agreement commits Cox and Advance to such investments, conditioned upon not only "necessary regulatory approvals," but the negotiation of the definitive terms of the purchase agreement and of related documentation and consummation of the tender offer. Like the conditions attendant in lender commitment letters, the conditions imposed in the equity investment letter agreement represent that Cox and Advance have "gone as far as [they] could under the circumstances" in providing reasonable assurance that the investments would be made "short of making a legally binding" commitment. *Id.* That one of the conditions to the equity investment agreement involved antitrust clearance of the QVC-Cox-Advance transaction is irrelevant. Thus, we find that the challenges to QVC's equity financing are without merit.[27] And whether the proposed QVC-Paramount merger has yet received its antitrust approvals is equally irrelevant to our action on QVC's STA request.[28] Commission action on a tender offer for a communications company is one of only several regulatory hurdles a bidder must clear. In adopting our tender offer policy, the Commission considered the abbreviated time periods set by Congress under the Hart-Scott-Rodino Antitrust Improvements Act, within which the Department of Justice and the FTC must evaluate mergers via tender offer. *Tender Offers*, 59 R.R. 2d at 1556-57. But we have never gauged the timing of our action in individual tender offer cases upon the bidder's receipt of antitrust clearance under Hart-Scott-Rodino, and Viacom offers no rationale as to why we should do so in QVC's case. The Commission objective of governmental neutrality is satisfied when we have addressed the regulatory issues before us, and it is the duty of the bidder to await all necessary approvals, not for us to coordinate them.[29]

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partment of Justice and FTC before consummating their proposed transaction. The acquisition of QVC stock by Cox and Advance apparently surpasses the threshold levels of Hart-Scott-Rodino, mandating that they submit the appropriate premerger notification materials. *See* 15 U.S.C. §18a(a).

[27] NAACP/LULAC, in their comments, argue that Liberty's divestiture of QVC stock creates two contractual obligations for QVC which jeopardize its financial qualifications: (1) the purchase of Liberty's equity and (2) the "repurchase" of the Cox-Advance-Comcast investment amounts. We believe that NAACP/LULAC take contractual provisions out of context to raise a financial issue where none exists. First, as to the Liberty contract, attached as Exhibit (c)(12) in Amendment No. 6 to QVC's Schedule 14D-1, it is true that Liberty does have the right to require QVC to purchase Liberty's QVC stock, but only within the last few months of the 18-month divestiture period and only if it so chooses. QVC, however, may elect to sell Liberty's shares to a third party. If the price is less than $60 per share, only then would QVC be indebted to Liberty, and only for the price difference. As in the past, we decline to become involved in a proposed licensee's debt levels, especially here, where that debt may never be incurred. *Tender Offers*, 59 R.R. 2d at 1566 n.139 (*citing Turner Broadcasting System, Inc.*, 101 F.C.C. 2d 843 (1985)). And as to the Cox-Advance-Comcast contract, NAACP/LULAC argue that QVC will, "under certain circumstances be obligated to repurchase up to $1.5 billion of equity securities" the three investors are to purchase. We find no such provision or reference to any such provision. However, NAACP/LULAC may have improperly construed the equity investors' revised letter agreement, attached as Exhibit (c)(10) to QVC's Amendment No. 6, which specifies that QVC must reimburse the $1.5 billion to its investors, but only if the investors so request and only if QVC stockholders have not by a certain date approved the issuance of the stock in which Cox, Advance, and Comcast have agreed to invest $1.5 billion. This provision merely contains safeguards for the investors in the event QVC does not fulfill its part of the investment agreement, but does not indicate that QVC will be unable to issue such stock. Thus, the allegations of NAACP/LULAC are wholly speculative and fail to raise a substantial and material question as to QVC's ability to finance the tender offer.

[28] Of course, it would be relevant to us if the Department of Justice or the FTC, the agencies charged with reviewing potential antitrust problems, had reached the determination that the bidder's proposed merger should not go forward. Accordingly, we speak here only of the timing of any approvals, not of any action taken by the agencies against the proposed merger. Moreover, we note, as represented in Amendment No. 10 to QVC's Schedule 14D-1, that the Hart-Scott-Rodino waiting period for QVC's acquisition of Paramount has been terminated.

[29] Indeed, coordinating the timing of our action with that of another agency would undermine our objective in designing the two-step process, to act expeditiously in tender offer cases. *Tender Offers*, 59 R.R. 2d at 1554-57; *see also CNCA Acquisition Corp.*, 103 F.C.C. 2d 6089-90 (rejecting argument that the Commission defer action pending a ruling by a state public utilities commission on the validity of a voting trust). Moreover, it would be nearly impossible to coordinate the adoption and

26. As to QVC's bank financing, we note that there are on the record in this proceeding two sets of letters from each of the six banks agreeing to participate in a loan facility for use by QVC. Those banks are Chemical Bank, the Bank of Nova Scotia, LTCB Trust Company, Barclay's Bank, NationsBank of Texas, and the Toronto-Dominion Bank. The first set of letters, which QVC obtained in late September 1993 in connection with its pre-tender offer bid to purchase Paramount and initially submitted with its Schedule 14D-1, confirms each bank's commitment to provide $500 million. Attached to each letter are six pages of terms relating to the loan facilities. One of the conditions of this loan facility, based upon QVC's pre-tender offer proposal, is that QVC purchase all of the outstanding capital stock of Paramount. QVC's tender offer, in contrast, contemplates a cash purchase of only 51 percent of Paramount's outstanding stock. However, in their follow-up letters, all dated early November 1993, the banks each expressly indicate their "present firm intention" to participate in a $3 billion loan facility so that QVC may acquire Paramount shares pursuant to the tender offer, "on terms and conditions comparable" to those detailed in the first commitment letters. Accordingly, we find that the two sets of letters, in tandem, demonstrate QVC's reasonable assurance of bank financing for its tender offer.[30] We conclude, in sum, that QVC is financially qualified to consummate the tender offer.[31]

## CONCLUSION

27. We have reviewed the proposal, the petition to deny and the opposition and conclude that grant of QVC's request for a STA would serve the public interest, convenience and necessity.

28. Accordingly, IT IS ORDERED, That the opposition filed by Viacom IS GRANTED to the extent discussed herein and is otherwise DENIED. The petition to deny, its supplement and subsequent comments filed by NAACP/LULAC, to the extent they are directed to the instant application, a request for STA, ARE DENIED.

29. IT IS FURTHER ORDERED, That the request for special temporary authorization IS GRANTED to G. William Miller, trustee, for 180 days from the release date of this decision, to solicit, collect and acquire the stock of Paramount Communications Inc., subject to the representations set forth in its applications and pleadings, the conditions set forth in the trust instrument, except as limited by this decision or the following conditions, which take effect upon the release of this Order, unless otherwise specified:

1. G. William Miller will resign his positions as vice president and director of Agricole and as president and director of TAG USA prior to consummation of the tender offer. He must also divest all ownership interests, if any, in TAG USA prior to that time.

2. G. William Miller will continue to refrain from engaging in any discussions, negotiations and any other activity related to the Agricole note with Agricole, TAG USA, TAG or Paramount and any of their representatives or affiliates. He, as well as members of his firm, G. William Miller & Co., Inc., must also cease consulting on any other matter with the TAG entities.

3. QVC Network, Inc., its subsidiaries, and the officers and directors of those corporations (collectively referred to below as QVC interests), while the trust is in effect, will not nominate a member of the board of directors of Paramount or its subsidiaries as their representative or influence the trustee's selection of directors. Any persons nominated by the trustee, and elected, for the board of Paramount shall be subject to the same restrictions and conditions applicable to the trustee, and will have no familial ties or business relationships with the QVC interests.

4. The QVC interests will not involve themselves, directly or indirectly, in the operation or management of Paramount, or seek to influence the operation or management of Paramount.

5. Any communications from the trustee to the QVC interests relating to the tender and purchase of shares from the present stockholders or to the maintenance and operation of Paramount must be in writing. No communications shall be made by the QVC interests to the trustee, orally or in writing, relating to the management or operation of the corporation. Communications from the QVC interests to the trustee in connection with the tender and purchase of shares must be in writing.

6. The trustee will maintain the status quo, as defined in *Tender Offers*, 59 R.R. 2d 1536 (1986). This directive requires that the trustee act so as to maintain the present management and operations of the corporation. The trustee will have the discretion to oppose

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release of Commission orders with decisions issued by the Department of Justice and the FTC, agencies operating under completely different organic statutes. For example, under Hart-Scott-Rodino, once both parties to a merger have filed under the premerger notification program, the 30-day statutory waiting period, 15 days for cash tender offers, commences. However, either party may request that the waiting period be terminated before the statutory period expires. According to a publication issued by the FTC, early termination is granted for most transactions and on the average, requests for early termination have been granted within two weeks of the filing date. *Guides to the Premerger Notification Program, Guide I* 11 (January 1991). Although the Commission may act upon a STA request at any time, pleading schedules are crafted for the circumstances of each tender offer case so as to permit comments by parties. Even if timing between the agencies could be coordinated, the benefit to such action is negligible. As it stands, if the Commission were to grant a STA request to a bidder's trustee, the bidder could not proceed with a proposed merger unless it has received approval from the Commission and clearance from the Department of Justice and the FTC.

[30] Moreover, in Exhibit (b)(2) of Amendment No. 10 to its Schedule 14D-1, QVC provides copies of November 19, 1993 commitment letters from the six banks which have revised their $3 billion credit facility to accommodate QVC's tender offer, as opposed to their earlier commitment to fund QVC's pre-tender offer bid for Paramount.

[31] As noted in Notes 6 and 15, *supra*, QVC increased its tender offer price, thereby raising the total cash price from approximately $4.83 billion to $5.5 billion. Added to the $2 billion equity investment and the $3 billion bank financing is the $1 billion of QVC common stock to be purchased by BellSouth, totaling $6 billion, more than the $5.5 billion QVC needs to finance its most recent tender offer price.

only actions inconsistent with the preservation of corporate assets or actions that would be inconsistent with the transfer of control, if approved, to the QVC interests.

7. There will be no substantial changes in the trust instrument, except as may be necessary to comply with this Order, or as may be approved in advance by the Commission. Any insubstantial changes in that instrument must be filed promptly, within 10 days of the date of execution, with the Commission, with a copy to the Chief, Video Services Division.

8. In the event that the application to transfer control to QVC is not approved, the trustee will notify the Commission promptly, within 30 days after a final determination by the Commission, after a court-ordered sale, or after QVC and the trustee jointly determine that such a transfer will not be pursued, with regard to the trustee's plans for disposing of the stock in the shortest period possible.

9. Any request for an extension of this authorization, if needed, will be filed at least 30 days in advance of the expiration date.

10. Any law firm or firms the trustee consults shall represent no clients with involvement in, or connection with, the QVC interests.

30. The Mass Media Bureau will send copies of this Memorandum Opinion and Order to the parties to this proceeding by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**ET Docket No. 93-7**

In the Matter of

Implementation of Section 17
of the Cable Television
Consumer Protection and
Competition Act of 1992

Compatibility Between
Cable Systems and Consumer
Electronics Equipment

## NOTICE OF PROPOSED RULE MAKING

**Adopted: November 10, 1993; Released: December 1, 1993**

**Comments Due: January 10, 1994**
**Reply Comments Due: January 25, 1994**

By the Commission:

## INTRODUCTION

1. By this action, the Commission is proposing regulations for assuring compatibility between consumer electronics equipment and cable systems. These regulations will implement the statutory requirements set forth by Congress in Section 17 of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), enacted October 5, 1992.[1] The objective of this portion of the 1992 Cable Act is to ensure compatibility between consumer equipment and cable systems, consistent with the need to prevent theft of cable service, so that cable subscribers will be able to enjoy the full benefits of both the programming available on cable systems and the functions available on their television receivers and video cassette recorders (VCRs).

2. The rules we are proposing herein are based on the findings and recommendations in our recent "Report to Congress on Means for Assuring Compatibility Between Cable Systems and Consumer Electronics Equipment" ("Compatibility Report").[2] These proposals include measures that are intended to provide a significant degree of improved compatibility between existing cable and consumer equipment and also include provisions for achieving more substantial improvements in compatibility through the introduction of new cable and consumer electronics equipment.

## BACKGROUND

3. In the 1992 Cable Act, Congress recognized that there are a number of compatibility problems that arise between the provision of cable service and current consumer electronics equipment.[3] These problems include difficulties in the use of VCRs to record programming and in the operation of special features of TV receivers such as "Picture-in-Picture." In addition, current cable practices often prevent the use of customer-owned remote control devices, both those that are supplied with receivers and VCRs and universal remote control devices that could be used to control both cable set-top devices and consumer equipment. Finally, there appears to be confusion on the part of consumers about whether, and the extent to which, equipment is "cable ready" or "cable compatible." For example, current TV receivers and VCRs vary in their ability to tune the full range of channels offered by cable systems.

4. *Section 17 Provisions.* Section 17 of the 1992 Cable Act adds a new Section 624A to the Communications Act of 1934, that addresses compatibility between consumer electronics equipment and cable systems.[4] In Section 624A(a), Congress makes the following findings with regard to this matter:

> - TV receivers and VCRs often contain premium features and functions that are disabled or inhibited because of cable scrambling, encoding, or encryption and by the use of cable devices, such as converters and remote control units, needed to receive programming;
>
> - Consumers will be less likely to purchase, and electronics manufacturers will be less likely to develop, manufacture, or offer for sale, TV receivers and VCRs with new and innovative features and functions, if these problems are allowed to persist; and,
>
> - Cable operators should use technologies that will prevent signal thefts while permitting consumers to benefit from the features and functions contained in such television receivers and video cassette recorders.[5]

5. Section 624A(b) specifies that, within one year of the enactment of the legislation, the Commission, in consultation with representatives of the cable and consumer electronics industries, must report to Congress on means of assuring compatibility between TV sets, VCRs and cable systems, consistent with the need to prevent theft of cable service.[6] This section also provides that within 180 days of

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[1] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, (1992), §17. This proceeding is limited to issues involved in implementation of Section 17 of the 1992 Cable Act. We are addressing the implementation of other portions of this new legislation in separate proceedings.

[2] See "Report To Congress On Means Of Assuring Compatibility Between Cable Systems and Consumer Electronics Equipment," adopted October 5, 1993.

[3] A more complete discussion of the various compatibility problems is provided in the "Compatibility Report," *supra*.

[4] *See* Section 624A, Section 17 of the 1992 Cable Act, *supra*.

[5] *See* Section 624A(a), Section 17 of the 1992 Cable Act, *supra*.

[6] *See* Section 624A(b)(1), Section 17 of the 1992 Cable Act, *supra*.

that report, the Commission must issue such regulations as are necessary to ensure compatibility between consumer electronics equipment and cable systems.[7] Section 624A(b) further provides that in issuing these rules, the Commission shall consider whether and, if so, under what circumstances to permit cable systems to scramble or encrypt signals or to restrict cable systems in the manner in which they scramble or encrypt signals. However, it further provides that the Commission shall not limit the use of scrambling technology where it does not interfere with the functions of subscribers' TV receivers or VCRs.[8]

6. Section 624A(c) specifies that, in developing the rules required by Section 624A(b), the Commission is to consider:[9]

- The costs and benefits to consumers of imposing compatibility requirements on cable operators and TV manufacturers in a manner that, while providing effective protection against theft or unauthorized reception of cable service, will minimize interference with, or nullification of, the special functions of subscribers' TV receivers or VCRs, including functions that permit the subscriber to--

  -- watch a program on one channel while simultaneously recording a program on another channel;

  -- recording two consecutive programs that appear on different channels; and,

  -- use advanced television picture generation and display features, and;

- The need for cable operators to protect the integrity of the signals transmitted by the cable operator against theft or to protect such signals against unauthorized reception.

7. Section 624A(c) further specifies that the equipment compatibility regulations shall include:[10]

- Technical requirements with which a TV receiver or VCR must comply in order to be sold as "cable compatible" or "cable ready";

- Requirements that cable operators offering channels whose reception requires a converter unit--

  -- notify subscribers that they may not be able to use the special features of their TV receivers and VCRs;

  -- to the extent technically and economically feasible, offer subscribers the option of receiving all other channels directly, without passing through the converter unit;

- Rules to promote the commercial availability, from cable operators and retail vendors that are not affiliated with cable systems, of converter units and remote control devices that are compatible with converter units;

- Requirements that cable operators who offer subscribers the option of renting a remote control unit--

  -- Notify subscribers that they may purchase a remote control from any source that sells such devices;

  -- Specify the types of remote control units that are compatible with the converter unit supplied by the cable operator; and,

- Prohibit a cable operator from taking any action that prevents or in any way disables its converter units from operating with commercially available remote controls.

8. Finally, Section 624A(d) requires the Commission to review periodically and, if necessary, modify the regulations issued pursuant to this section in light of actions taken in response to the regulations and to changes in cable systems, TV receivers, VCRs and related technology.

9. *The Compatibility Report.* On January 14, 1993, the Commission adopted a *Notice of Inquiry* (*NOI*) seeking information and comment from all interested parties on the various issues relating to compatibility.[11] The Commission indicated that the information gathered under the *NOI* was to be used in preparing the report to Congress required under Section 17 and in formulating proposals for a subsequent rule making action to implement the compatibility regulations required under this portion of the 1992 Cable Act. Subsequently, representatives of the cable television and consumer electronics industries have worked together through the "Cable-Consumer Electronics Advisory Group" (CAG) to address the various topics in the matter of cable equipment compatibility. This group submitted a number of measures to address both short term and long term compatibility problems. A key element of these mea-

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[7] Under Part 76 of the Commission's current rules, cable systems are subject to technical standards that specify minimum performance with regard to the quality of NTSC (or similar format) video signals provided at subscriber terminals, 47 C.F.R. §§76.62 and .605; delivery of closed captioning information, 47 C.F.R. §76.606; and signal leakage, 47 C.F.R. §§76.601(e), .605, .609(h) and .610 - .617. NTSC is the analog television system currently used in the United States. Portions of the above rules also specify requirements for monitoring and measuring technical performance and resolving any interference resulting from cable system operation. The Commission's rules currently do not address compatibility between cable systems and extended features of subscribers' TV sets, VCRs and related equipment.

[8] *See* Section 624A(b)(2), Section 17 of the 1992 Cable Act, *supra*.

[9] *See* Section 624A(c)(1), Section 17 of the 1992 Cable Act, *supra*.

[10] *See* Section 624A(c)(2), Section 17 of the 1992 Cable Act, *supra*.

[11] *See Notice of Inquiry*, ET Docket No. 93-7, 8 FCC Rcd 725 (1993).

sures is the implementation of a "Decoder Interface."[12] This would be a new feature that would be incorporated in "cable ready" TV receivers and VCRs to enable use of component cable descrambler/decoders. The component descrambler/decoders would connect to a consumer device through a special Decoder Interface connector and would process signals *after* the unit's tuner. This would avoid the current problems caused by the use of set-top devices that disable features of consumer equipment related to tuning. The CAG plan further provided that cable systems that use scrambling would be required to provide component descramblers to subscribers that have Decoder Interface equipped receivers and VCRs.

10. In the "Compatibility Report," the Commission concluded that the most appropriate course of action for addressing the cable system/consumer electronics compatibility matter would be to: 1) provide immediate relief for the existing base of (consumer equipment; 2) require more substantial measures by both the cable and consumer electronics industries towards achieving significant compatibility in the near future; and, 3) encourage the development of consumer equipment and cable technologies that are more fully compatible in the long term. Consistent with this general plan, the Commission made a number of recommendations for specific steps to improve compatibility. These steps reflect the requirements for regulations specified in Section 17 and also include many elements of the plan suggested by the CAG. The Commission further indicated that these recommendations would form the basis for its proposals for compatibility regulations.

## DISCUSSION

11. In developing regulations to ensure compatibility between cable systems and consumer equipment, we intend to be guided by the principles set forth in Section 17 of the 1992 Cable Act. Consistent with Section 17, our primary goal in this matter is to improve the compatibility between cable systems and consumer electronics equipment so as to allow cable subscribers to use the special features and functions of their TV sets and VCRs when receiving cable service. We will also consider the needs and interests of cable operators in protecting their signals against theft or unauthorized use. We further believe it is important to provide for and encourage competition in the market for equipment used by subscribers to receive cable service. Such equipment includes channel converters, remote control units and other customer premises devices. Wherever possible, we intend to adopt regulations that will allow subscribers to use their own equipment, which could be obtained from retail vendors as well as cable system operators, to interface with the service provided by cable systems.

12. *Proposals for Existing Equipment.* We are proposing a number of requirements for cable systems that are intended to provide consumers with significant improvements in the use of their TV receivers and VCRs with cable service in the near term. First, we are proposing to require cable systems that use scrambling technology to provide supplementary equipment such as set-top devices with multiple descramblers and/or timers and by-pass switches to enable the operation of extended features and functions of consumer equipment that make simultaneous use of multiple signals. Cable systems would be required to provide this supplemental equipment at the request of individual subscribers and would be permitted to charge for the equipment and its installation in accordance with the rate regulation rules for customer premises equipment used to receive the basic service tier.[13] We are also proposing to require cable operators to provide their subscribers the option of having all signals whose reception does not require use of a converter to pass those signals directly to the subscriber's TV receiver or VCR, without passing through the set-top device. This capability could be provided through use of by-pass switches and similar equipment. We request comment on all aspects of our proposals for improving compatibility between cable systems that use scrambling and existing consumer equipment. We specifically ask that interested parties address the issue of whether and how cable systems should be allowed to charge for supplemental equipment needed to facilitate the operation of enhanced features of consumer equipment in light of the compatibility requirements of Section 17.

13. We are further proposing to prohibit cable systems from scrambling signals on the basic tier of cable service. This prohibition would ensure that consumers that have purchased TV receivers and VCRs that are capable of tuning basic service channels are able to continue to receive service on those channels without the need for a set-top device. We note that most basic services currently are carried unscrambled. We also observe that cable systems often include additional channels on their basic tier beyond those required to be on the basic tier under our rules.[14] We request comment on whether such signals should be exempted from the prohibition on scrambling of signals on the basic tier.

14. Consistent with the provisions of Section 17 regarding the operation of remote control features, we are proposing to require cable operators that offer subscribers the option of renting remote control units to operate set-top devices to permit the operation of their set-top devices with such commercially available remote control units, or otherwise take no action that would prevent the use of such remote control units. Cable operators would, however, be permitted to disable the remote control functions of a subscriber's set-top in cases where the subscriber so requests.

15. We are also proposing to require cable operators to provide a consumer education program on compatibility matters to their subscribers. Cable systems would be required to provide this information in writing to their subscribers at the time they first subscribe and at least once a

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[12] Additional description of the Decoder Interface connector and the associated component descrambler/decoder is provided in the "Compatibility Report," *supra*.

[13] *See* 47 C.F.R. §76.923.

[14] Section 76.901 of our rules provides that the basic service tier shall, at a minimum, include all signals of domestic broadcast stations provided to any subscriber (except a signal secondarily transmitted by satellite carrier beyond the local service area of such station, regardless of how such signal is ultimately received by the cable system), any public, educational and governmental programming required by the franchise to be carried on the basic tier and any additional video programming signals added to the basic tier by the cable operator. *See* 47 C.F.R. §76.901.

year thereafter.[15] The consumer education program would include a written notification that, in cases where a set-top device is used to receive service, subscribers may not be able to use special features and functions of their TV receivers, including functions that allow the subscriber to:

- View a program on one channel while simultaneously recording a program on another channel. This would apply for VCRs and any new recording equipment that might be introduced, such as a video disc recorder.
- Record two or more consecutive programs that appear on different channels.
- Use advanced picture generation and display features such as "Picture-in-Picture," channel review and other functions that necessitate channel selection by the consumer device.

Cable operators would further be required to inform their subscribers that some models of TV receivers and VCRs may not be able to receive all of the channels offered by the cable system when connected directly to the cable system, to briefly explain the types of channelization incompatibilities subscribers could encounter when connecting their equipment directly to the cable system and to offer suggestions for resolving channelization problems. Such solutions could include the use of a set-top channel converter device, to obtained from either the cable operator or by a third party retail vendor. We request comment on these consumer education proposals.

16. We are proposing to require cable systems that offer remote control capability with their set-top devices to include in their consumer education program a written notification that subscribers may purchase from other sources a remote control unit that is compatible with the cable system's. Cable systems would also be required to list the models of remote control units that are compatible with the set-top devices they employ and would be required to provide a list of sources of where those models can be obtained in the local area. This list would be required to be current as of no more than 60 days before the yearly mailing of consumer information. We request comment on the procedures cable operators should be required to follow in compiling the list of compatible remote controls and local sources where those units are available. For example, should the list be limited to models of remote controls that are currently available in the system's local area, or all models that are currently available nationwide. We observe that a broader listing requirement might lead consumers to seek a wider range of choices and thereby promote the availability of a wider selection of remote controls in the local area. We also request comment on how cable operators should compile lists of the remote controls that are available, including whether they should be required to survey the local retailers.

17. We believe that the above proposals for addressing the compatibility problems associated with existing cable systems and consumer equipment can be implemented relatively quickly. None of these proposals would appear to impose significant burdens on cable systems. These requirements can be met with existing models of supplementary equipment, minor reconfigurations of, or software changes to, existing cable facilities and preparation of relatively brief texts to inform consumer about compatibility problems and how they can be resolved. We therefore are proposing to make these requirements effective six months after we adopt the final rules in this matter. We request comment on all aspects of our proposals for improving compatibility problems between with existing cable system and consumer electronics equipment.

18. *Proposals for New Equipment.* We recognize that, given the limitations of existing consumer equipment and the current design of cable systems, the above measures would not provide a full solution to the current compatibility problems between cable systems and consumer equipment. More significant improvements in compatibility are obtainable through the introduction of new consumer electronics and cable equipment. Therefore, our regulatory approach for achieving a more complete resolution of these problems will need to focus on new consumer equipment and new/rebuilt cable systems. To promote full compatibility, we are proposing standards for new and rebuilt cable systems and for new consumer equipment. The new standards are intended to ensure that there is an efficient, effective interface between cable systems and consumer equipment intended for use with cable service. These standards are also designed to provide the flexibility needed to ensure compatibility through the transition from the existing analog cable and consumer equipment technologies to the new digital systems that are expected to be introduced in the future.

19. At this time, we believe the most practical solution for ensuring compatibility between scrambling technologies and the special features of consumer equipment is to require use of an updated Decoder Interface connector and associated component descrambler unit, as recommended by the CAG. We also believe that the most appropriate approach for ensuring that consumer equipment is able to tune all of the channels available on whichever cable systems it may be connected to is to require both cable systems and consumer electronics equipment manufacturers to adhere to the amended EIA/IS-6 channel identification plan now being developed by the Joint Engineering Committee (JEC) of the Electronics Industries Association/ Consumer Electronics Group (EIA) and the National Cable Television Association.[16] Use of the Decoder Interface

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[15] After the initiation of service, cable systems would be permitted to choose the time and means by which to meet the annual consumer information requirement. For example, cable systems could choose simply to include the yearly consumer information on compatibility in a mailing with one of their regular billings to subscribers.

[16] The current standard is "EIA Interim Standard 6 (EIA/IS-6) Recommended Cable Television Channel Identification Plan," prepared by the EIA/NCTA Joint Engineering Committee Channelization Working Group (May 1983). According to discussions with members of the JEC, the amended EIA/IS-6 channel plan, to be designated EIA/IS-6A, will specify channels up to 1 GHz and include a formula for identifying additional channels above 1 GHz. The EIA indicates that the IS-6 channel plan is now in the process of being adopted by the American National Standards Institute (ANSI) as an EIA/ANSI standard. The EIA further indicates that the extended IS-6A plan will also be submitted for approval as an EIA/ANSI standard when it is complete.

approach and EIA/IS-6 channelization plan, coupled with new tuner and shielding standards for cable ready consumer equipment, would avoid the need for use of set-top converter units in a cost effective manner for both cable systems and their subscribers.

20. To implement the above plan for new equipment and in accordance with the specific requirements of Section 17, we are proposing to adopt new standards for all consumer electronics equipment that is marketed as "cable ready" or intended for connection to cable service. These standards would require that cable ready equipment include a Decoder Interface connector that meets the specifications of the EIA/ANSI "Standard Baseband (Audio/Video) Interface Between NTSC Television Receiving Devices and Peripheral Devices" (EIA/ANSI 563).[17] As we observed in the "Compatibility Report," the CAG is now in the process of developing an updated version of this standard that provide a hybrid analog/digital Decoder Interface. We propose to adopt this updated standard as an alternative to the current version of EIA/ANSI 563 if the new standard is available in sufficient time for us to obtain comment on it before we compete our decision in this matter. We request comment on our proposals for use of the Decoder Interface connector and component descrambler/decoders to achieve compatibility between cable systems that use scrambling technologies and consumer TV receivers and VCRs.

21. We are further proposing to require that all cable ready TV receivers and VCRs have the capability to tune all cable channels over a frequency range of 54 MHz to 1 GHz in accordance with the cable channel identification plan specified in the amended EIA/ANSI IS-6 standard.[18] We request comment on whether a 1 GHz upper boundary on the channel range of consumer equipment is an appropriate range of channels for cable ready equipment and on the economic and technical considerations associated with including 1 GHz tuners in consumer equipment. In this regard, we also ask interested parties to address whether it might be desirable to provide a "migration plan" to full 1 GHz capability that would first require a cable channel capability somewhat lower than 1 GHz, such as 750 MHz, and then later require full 1 GHz capability.

22. We are proposing that cable ready consumer equipment meet new requirements for improved receiver performance. Our proposals in this area are intended to ensure that consumers are able to receive cable signals clearly and to prevent interference. We are proposing standards to address the problems of adjacent channel interference, tuner overload, direct pick-up (DPU) interference and signal leakage. We are first proposing to require that cable ready equipment not exceed a criterion of "just perceptible" interference on the desired signal from an adjacent channel signal whose visual carrier level is 3 dB above the visual carrier level of the desired signal.[19] To avoid tuner overload, we are proposing to require that the tuners of cable ready consumer devices do not generate distortion products exceeding 55 dB below the visual carrier on any frequency in the desired channel.[20]

23. To address DPU and signal leakage, we are proposing to require that cable ready equipment not exceed a criterion of "just perceptible" interference in the presence of a 100 mV/m field generated by a CW source.[21] We are further proposing to require that the level of emissions conducted onto a cable system by a cable ready consumer device be no more than -37 dBmV, referenced to 75 ohms, over the frequency range 54 to 1002 MHz. In addition, we are proposing to require that cable ready units be tested to comply with the existing Part 15 limits on radiated emissions from unintentional radiators when connected to cable service.[22] In testing for such radiated emissions, we propose to require that compliance be demonstrated with input signals on six cable channels distributed evenly over the frequency range 54 MHz to 1002 MHz and that the signal level of the input cable signal be varied from 0 to 25 dBmV.[23] We are also proposing to apply these performance and testing requirements to cable system terminal devices.[24] We request comments on our proposals for performance standards for cable ready equipment. Commenting parties are specifically asked to submit suggestions regarding the methods and signal levels to be used in testing for compliance with these standards.

24. RF emissions can also leak from and/or enter into cable systems through input selector switches (A/B switches) used to alternate between service from a cable system, an antenna for reception of broadcast signals and other equipment such as a VCR or videodisc player if the switches do not provide adequate isolation between the various ports on the switch. Under the existing Part 15 rules, input selector switches used to alternate between cable and antenna service that are included in TV receivers and VCRs

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[17] *See* "Standard Baseband (Audio/Video) Interface Between NTSC Television Receiving Devices and Peripheral Devices," EIA/ANSI-563-1990.

[18] We note that the current version of IS-6 accommodates full 1 GHz cable operation and that IS-6A will maintain the current channel allocations below 1 GHz. Under IS-6, a 1 GHz system would operate between 54 and 1002 MHz and would have the potential for 158 active channels.

[19] A 3 dB higher adjacent channel signal corresponds to the variation in adjacent channel signals permitted under Section 76.605(4)(i) of our rules, 47 C.F.R. §76.605(a)(4)(i).

[20] Tuner overload results from the presence of many strong signals that interact and degrade the performance of the receiver.

[21] We also invite comment on the practicality of alternate test methods that do not rely on subjective observation of the television display. One alternative might be a method that directly measures the level of an interfering signal in the video baseband. We also believe that consumer equipment that complies with the DPU signal ingress standard will also be less likely to experience interference from both cable and off-the-air signals on the "image frequencies," *i.e.*, frequencies that are removed 14 or 15 channels from the desired channel.

[22] The Part 15 emissions limits that apply to consumer TV equipment are set forth in Section 15.109(a) of the rules. *See* 47 C.F.R. §15.109(a). The tests for radiated emissions when connected to a cable signal would be in addition to the existing tests required for radiated emissions when connected to an antenna input. *See* 47 C.F.R.§15.31(n).

[23] We invite comment as to whether such tests should be required over the entire range from 0 to 25 dBmV, or whether testing only at the two extremes would suffice.

[24] Cable system terminal devices are TV interface devices that serve, as their primary function, to connect a cable system to a TV receiver or other subscriber premise equipment. *See* 47 C.F.R. §15.3. These devices are subject to the general Part 15 emissions limits for unintentional radiators, as set forth in Section 15.115(d) of the rules. *See* 47 C.F.R. §15.115(d).

are required to comply with isolation standards.[25] We are proposing to clarify that these isolation requirements apply to all input selector switches that are used to alternate between cable and antenna input signals, including stand-alone units. We note that the input selector switch isolation rules currently are specified only for frequencies up to 550 MHz. We also recognize that it becomes more difficult to achieve high levels of isolation at higher frequencies and that the amount of isolation needed also decreases with increasing frequency. We therefore request comment on the appropriate limit or limits to specify for the frequency range from 550 MHz to 1002 MHz to conform with our proposal to require cable ready consumer equipment to be able to receive cable channels up to this frequency range. The extension of the input selector switch isolation standards we adopt would apply to all transfer switches used to alternate between a cable service and an antenna, including stand-alone units that are not part of a cable ready TV receiver or VCR.

25. We are also proposing to require that switches and other devices intended to be used to bypass cable set-top devices or other equipment not attenuate the input cable signals more than 6 dB at any output port. This requirement is intended to ensure that acceptable service is obtained when using supplementary equipment to improve compatibility between cable service and consumer equipment and would apply to both devices that are built into TV receivers and VCRs and stand-alone bypass switches and filters.

26. We believe the proposals set forth above constitute reasonable standards for cable ready consumer equipment that are practical to implement and would pose only a modest increase in costs for both equipment manufacturers and consumers. We request comment on the costs of implementing our proposals for cable ready equipment. Interested parties are asked to suggest alternative standards in cases where they believe that our proposals might be too burdensome. We also request comment on whether our proposals will adequately address the concerns to which they are directed and request alternative suggestions for addressing these issues.

27. In view of the fact that these proposals would require substantial improvements in the technical performance of cable ready equipment, we are also requesting comment on whether we should subject cable ready TV receivers and component decoders/ descramblers to authorization under the notification or certification procedures, rather than the verification procedure to which these devices are currently subject.[26]

28. The JEC and the CAG have indicated that they will complete their work on the amended IS-6 plan and the updated Decoder Interface standard by the end of 1993. On this basis, we are proposing to require that all consumer electronics equipment manufactured or imported after December 31, 1996, that is marketed as "cable ready' or otherwise marketed as intended for connection directly to cable service comply with the new cable ready standards. We believe this 21 month period after finalization of the channelization and Decoder Interface portions of the standard will provide an adequate amount of time for manufacturers to comply with the new rules. We will, of course, review the new industry developed standards and provide an opportunity for public comment before including them in our rules.

29. On the cable side, we are proposing to require cable system operators to use "in the clear" signal delivery technology or to provide component descramblers/decoders and/or any additional equipment that may be needed to process scrambled and/or digital video service through the Decoder Interface connector. Consistent with this plan, we are also proposing to require cable systems to provide service in a form that is compatible with the Decoder Interface and component descrambler/ decoder equipment used with that connector where "in the clear" signal delivery methods are not used.

30. Consistent with the recommendations in our "Compatibility Report," we are further proposing to require cable operators to provide component descrambler/decoders and any related equipment to subscribers without a separate charge for the equipment or its installation. Under this approach, installation and rental of component descramblers would be included as elements of the general cable network and therefore would not be recoverable by the cable operator through a separate charge.[27] Cable operators would be required to supply a component descrambler/decoder for all subscriber equipment that is equipped with a Decoder Interface connector. They would not be permitted to apply separate charges for the component descrambler/decoder units, either for installation or for the units themselves. We believe this treatment of component descramblers/decoders and their installation as part of the cable network will best achieve the statutory goals prescribed in Section 17 of the 1992 Cable Act. This approach will encourage consumers to acquire and use new TV receivers and VCRs that are equipped with the Decoder Interface. By avoiding a source of incremental revenue, it may also encourage cable operators to use signal delivery methods that provide all purchased channels simultaneously, in the clear. Under either the clear channel or the component descrambler/decoder approaches for cable signal delivery, compatibility will be enhanced and consumers will be able to enjoy the full functioning of their TV receivers and VCRs. Our proposal to require cable systems to provide subscribers with component descramblers at no separate charge departs from our rate regulations regarding unbundling of charges for installation and lease of equipment used to provide service to subscribers.[28] Parties who

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[25] *See* 47 C.F.R. §§15.115(c) and 15.117(h). These sections currently provide that transfer switches must provide 80 dB of isolation for signals in the frequency range 54 to 216 MHz and 60 dB for signals on frequencies from 216 to 550 MHz.

[26] The verification, notification and certification procedures are set forth in Section 2, Subpart J of the rules. *See* 47 C.F.R. §2, Subpart J.

[27] The rate regulation rules do not allow separate charges for costs associated with operation of the general cable network. The costs of elements associated with the network therefore are recoverable through subscriber revenues from regulated services offered on cable systems, *e.g.*, tiers of programming services. *See* 47 C.F.R. §76.922.

[28] 47 C.F.R. §76.923. *See Report and Order and Further Notice of Proposed Rule making*, MM Docket No. 92-266, 58 Fed. Reg. 29736, paras. 410-412 (May 3, 1993); *see also First Order on Reconsideration, Second Report and Order and Third Further Notice of Proposed Rule making*, 58 Fed. Reg. 46718, September 2, 1993. These rules, *inter alia*, require unbundling of rates for cable programming services from rates for installation and lease of equipment used by subscribers to receive that service.

believe that permitting a separate charge for this new equipment, as with our rate regulation of current equipment, would better achieve these goals should provide clear evidence to support that belief.

31. With regard to channelization, we are proposing to require cable systems built or re-built after one year from the effective date of the new rules to use the amended EIA/ANSI IS-6 channel plan for channels up to 1 GHz, consistent with our proposals for cable ready consumer equipment standards, and require all cable systems to use this channel plan after 10 years.[29] As the IS-6 standard has been substantially defined for some time and is already used by most cable systems, we believe one year is an adequate amount of time for new cable systems and rebuilds to comply with that standard. Cable systems would not have to activate channels for all of the channels specified in IS-6, but rather would be required to adhere to the frequency plan in this standard for the channels that they provide to their subscribers. We would also encourage cable systems to adhere to the IS-6 plan for channels above 1 GHz.

32. We believe our proposals for a long term solution offer the most cost effective means for achieving compatibility while also allowing cable operators flexibility in the security systems they employ to protect their programming from unauthorized reception. This plan would allow cable systems to continue to use scrambling systems to protect programming other than the basic tier of service. As described in the CAG's supplemental comments, the updated Decoder Interface to be built into new consumer receivers will provide capability to accommodate component modules that can process compressed digital signals as well as conventional scrambled signals. Thus, the Decoder Interface offers both a means for addressing the major current compatibility issue and a path for accommodating the next phase of technology expected to be introduced in the relatively near future. We believe the relatively modest increase in the cost of consumer equipment from the inclusion of a Decoder Interface and the cost of associated component descramblers/decoders constitutes a low cost solution for consumers.

33. While the supplemental equipment/Decoder Interface approach we are proposing appears to be the most practical solution for resolving the major problems of compatibility between cable systems and the special functions of consumer electronics equipment, we nonetheless believe the most desirable solution in this matter is for cable systems to use technologies that provide all authorized signals in the clear. We therefore intend to continue to encourage the use and development of cable signal delivery methods such as traps, interdiction, addressable filters and other clear channel delivery systems that eliminate the need for any additional equipment in the subscriber's premises. We also intend to examine any future developments in clear channel technology as part of our monitoring activities in this matter. We request comment on the above proposals and invite suggestions for alternatives that would ensure compatibility, with regard to both existing and future equipment, on a more convenient and cost effective basis while providing adequate security for cable signals. We also invite comment on the scheduling of the dates when cable systems and consumer equipment manufacturers should be required to comply with the new rules we will adopt. We note that neither Section 624A nor the legislative history address the issue of the schedule for compliance with the new rules. We seek comment on the schedule for implementing all aspects of new rules in this area.

34. In order to avoid future compatibility problems that could arise with the introduction of digital transmission methods by the cable industry, we also believe that it will be necessary to standardize the system used for digital transmissions. We invite comment on the development of a digital transmission standard for cable service. We request comment on the attributes of digital transmission service that would need to be standardized and possible candidate systems for such a standard. We note that the CAG believes it is feasible to establish standards for digital compression/decompression and a standard security interface system on a schedule that takes place over the next several years.[30] We recognize that developmental work in this area is still in progress and therefore request suggestions for a regulatory plan that would require completion of a digital cable transmission standard in a manner that would allow for timely and efficient introduction of consumer products that could receive service under the new standard. We will continue to monitor these developments to ensure that consumer interests are protected.

## PROCEDURAL MATTERS

35. Pursuant to Section 603 of the Regulatory Flexibility Act, Pub. L No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981), the Commission has prepared the following initial regulatory flexibility analysis (IRFA) of these proposed rules on small entities. Written comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of this Notice, but must have a separate and distinct heading designating them as responses to the regulatory analysis. The Commission's Secretary shall cause a copy of the Notice, including the IRFA, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act.

I. *Reason for Action.* Section 17 of the Cable Television Consumer Protection and Competition Act of 1992 requires the Commission to prescribe regulations for assuring

[29] We also seek comment on how the adoption of the EIA/IS-6 channel plan would affect the use of compression methods or multiplexing of cable channels.

[30] The CAG believe that standards for the digital cable environment can be established per the following timetable:

1993: Define cable ready

1994: Define transmission and tuner specifications

No later than 1995: Set target dates for standards for decompression and a standard security interface system.

*See* "Supplemental Comments of the Cable-Consumer Electronics Compatibility Advisory Group," ET Docket No. 93-7, filed with the Commission July 21, 1993.

compatibility between TV receivers and VCRs and cable systems. This Notice proposes rules to establish rules that will comply with the requirements of Section 17.

II. *Objectives.* The proposed rules are intended to assure compatibility between consumer electronics equipment and cable systems, consistent with the need to prevent theft of cable service. The goal of these regulations is to enable consumers to enjoy the full benefit of both the programming on cable systems and the functions available on their TV receivers and VCRs. The Commission also seeks to achieve these objectives in a cost effective manner for all parties involved.

III. *Legal Basis.* Authority for this rule making is provided in Sections 4(i), 4(j), 302, 303(r) and 624A of the Communications Act of 1934, as amended.

IV. *Description, Potential Impact and Number of Small Entities Affected.* The proposed rules would affect all of the more than 11,000 cable systems in this country and all manufacturers of TV receivers and VCRs. Initially, cable operators would be required to provide certain information about compatibility to their subscribers and to make available appropriate hardware for improving compatibility with existing consumer equipment. Cable systems would be able to charge for providing such hardware and its installation. After the cable ready receiver regulations become effective, receiver manufacturers will be required to include new features, including improved tuners and a Decoder Interface connector in all new TV receivers and VCRs. When these new cable ready consumer units are available, cable systems will be required to provide their subscribers a component descrambler/decoder for each new cable ready receiver or VCR at no separate charge.

V. *Reporting, Record Keeping and Other Compliance Requirements.* The proposals under consideration in this Notice do not include new reporting and record keeping requirements for either cable systems or consumer electronics manufacturers.

VI. *Federal Rules which Overlap, Duplicate or Conflict with the Proposed Rules.* None.

VII. *Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with Stated Objectives.* Wherever possible, the Notice proposes rules intended to minimize costs for both cable operators and consumer electronics manufacturers. The major area where alternatives are possible concerns the use of the Decoder Interface as a means for avoiding use of set-top devices. These features will resolve the need for set-top devices and also provide a path to compatibility with future services that use digital compression. While the Decoder Interface connector will be a new requirement for manufacturers, the cost of this feature can be recovered through a modest increase in the prices of TV receivers and VCRs. The amount of this increase is likely to be less for cable subscribers than the cost of technologies that would provide subscribers all authorized signals in the clear.

36. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 CFR Sections 1.415 and 1.419, interested parties may file comments on or before January 10, 1994, and reply comments on or before January 25, 1994. All relevant and timely comments will be considered by the Commission before taking further action in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comment and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

37. For further information concerning this Notice of Proposed Rule Making, contact Alan Stillwell (202-632-7060) or Julius Knapp (301-725-1585), Office of Engineering and Technology, Federal Communications Commission, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-294**

In the Matter of

Amendment of Section 73.202(b), RM-8342
Table of Allotments,
FM Broadcast Stations.
(Alexander City, Alabama and
West Point, Georgia)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: November 4, 1993; Released: December 8, 1993**

**Comment Date: January 31, 1994**
**Reply Comment Date: February 15, 1994**

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Solar Broadcasting Company, Inc. ("petitioner"), licensee of Station WSTH-FM, Channel 291C1, Alexander City, Alabama, requesting the reallotment of its channel to West Point, Georgia, and modification of its license accordingly.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules. In this regard, petitioner advises that the requested reallotment to West Point is mutually exclusive with the present allotment of Channel 291C1 at Alexander City, since no change in Station WSTH-FM's transmitter site is contemplated. The distance between West Point and Alexander City at Station WSTH-FM's existing tower site is 30.3 kilometers (18.7 miles) whereas a distance of 245 kilometers (152 miles) is required by Section 73.207(b)(1) of the Commission's Rules between Class C1 co-channels. Petitioner advises that, operating with existing facilities from its present site, Station WSTH-FM would be able to provide a 70 dBu signal over the entire boundaries of West Point. Petitioner adds that Alexander City (population 14,917)[1] would continue to receive city grade service from Station WSTH-FM, as well as local aural transmission service from its co-owned fulltime Station WTLM(AM) and from fulltime Station WACD-AM. Therefore, petitioner comments that adoption of its proposal will not leave Alexander City unserved. Petitioner advises that the city of West Point, Georgia, is served locally by Station WCJM(FM), Channel 265A, and fulltime Station WPLV-AM. We also note that fulltime Station WRLD(AM) is licensed to West Point.

### TECHNICAL STATEMENT

3. A staff engineering analysis reveals that Channel 291C1 can be allotted to West Point consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, at the presently licensed site of Station WSTH-FM, located 30.3 kilometers (18.8 miles) southwest of Alexander City at coordinates 32-45-33 and 85-28-04.

4. Although neither Alexander City, Alabama, nor West Point, Georgia, is located within an Urbanized Area, the licensed site of Station WSTH-FM at Alexander City is located 55.8 kilometers (34.7 miles) northwest of Columbus, Georgia, which is an Urbanized Area. West Point is located 49.1 kilometers (30.5 miles) north of Columbus. We also note that according to Commission records, Station WSTH-FM's signal is retransmitted via its translator Station W293AD (File No. BLFT-930713TD), to provide service to Columbus, Georgia.

5. We believe the proposal warrants consideration. The proposal would not deprive Alexander City of its only local transmission service, and its use is mutually exclusive with West Point. However, we request that petitioner provide additional information regarding the public interest benefits that would accrue from the reallotment of Channel 291C1 to West Point, Georgia since it proposes no reception change in the present technical facilities of Station WSTH-FM to accommodate its proposal. We note that in support of its proposal, petitioner cites to the reallotment of Channel 231C1 from McComb, Mississippi to Kentwood, Louisiana, in MM Docket No. 90-282, 6 FCC Rcd 3367 (1991), and a pending proposal concerning the reallotment of Channel 300C from Poplarville to Bay Saint Louis, Mississippi, in MM Docket No. 90-163, 5 FCC Rcd 1913 (1990). However, each of those proceedings was filed prior to the adoption of the *Memorandum Opinion and Order* in MM Docket No. 88-526 clarifying the standards governing change of community petitions for rule making. *See* 5 FCC Rcd 7094 (1990).

6. In light of the above, we shall propose to modify Station WSTH-FM as requested, to specify West Point, Georgia, as its community of license. In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we shall not accept competing expressions of interest nor require that petitioner demonstrate the availability of an additional equivalent channel at West Point.

7. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Alexander City, Alabama | 291C1 | -- |
| West Point, Georgia | 265A | 265A, 291C1 |

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we

[1] Population figures cited herein were taken from the 1990 U.S. Census.

note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **January 31, 1994,** and reply comments on or before **February 15, 1994,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Allen Woodall, Jr.
President, Solar Broadcasting
Company, Inc.
1236 Broadway
Columbus, GA 31994

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-205**

In the Matter of

Amendment of Section 73.202(b), RM-8270
Table of Allotments,
FM Broadcast Stations
(Donalsonville, Georgia)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: November 3, 1993; Released: December 8, 1993**

By the Assistant Chief, Allocations Branch:

1. Pursuant to the request of Jerry E. White and Donald F. White, D/B/A Seminole-Decatur Radio Company ("Seminole"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 4851 (1993), proposing the allotment of Channel 298A to Donalsonville, Georgia, as that community's second local FM service. Seminole filed comments restating its intention to apply for Channel 298A, if allotted.[1] Clyde and Connie Scott D/B/A EME Communications ("EME"), filed an opposition to the Donalsonville proposal. Petitioner filed reply comments.

2. In opposing comments EME argues that the Donalsonville proposal will adversely impact the allotment of Channel 299C3 at Sasser, Georgia, and should be denied. EME states that Seminole's petition should be dismissed for failure to comply with Section 1.52 of the Commission's rules, which requires appropriate verification. EME also contends that petitioner's claim to apply for a construction permit, and upon grant, shall promptly construct its station, is inherently suspect and may not be credited, since Seminole previously petitioned the Commission to allot Channel 254A at Smithville, Georgia, made a representation that it would apply for the channel, and did not file an application. *See Americus, Fort Valley & Smithville, Georgia*, MM Docket No. 90-325, 6 FCC Rcd 942 (1991). Therefore, EME states that where a party fails to adhere to its material representations, the Commission no longer takes that party's statement at face value, citing *Richard Bott II*, 8 FCC Rcd 4974 (1993). EME also states that Seminole's proposal is technically flawed as well. EME states that the Donalsonville rule making is short spaced to the Sasser reference points. EME claims that if the Donalsonville proposal is adopted, it may not be possible to build and operate a station at Sasser, because the Donalsonville proposal will cause a 92% reduction in the area to locate a transmitter site for Channel 299C3 at Sasser. EME states that it has conducted a check with all land owners within the significantly reduced clear area to locate a transmitter site for Channel 299C3 at Sasser, and that "[n]o single owner was willing to either lease or sell suitable land within the area for a transmitter site."

3. In reply Seminole states that EME's only valid argument is that land for a site for Sasser may not be available within the useable area of Channel 299C3. However, Seminole states that EME fails to offer any proof that "[n]o single owner is willing to either lease or sell suitable land within the area for a transmitter site." Seminole contends that EME has engaged in an undeserved personal attack and has failed to present all it knew in the Smithville proceeding in a deliberate attempt to mislead the Commission. Seminole contends that EME incorrectly stated that Channel 254A was allotted to Smithville. It states that although Seminole proposed Channel 254C3, the Commission allotted Channel 295A with a substantially different useable area from the original site. Seminole also states that it has been a party to applications for one AM and one FM and two low power TV construction permits, and all but one has been built.

4. We have carefully considered all the information before us. Both Seminole and EME acknowledge the fact that land may not be available within the useable area of Channel 299C3 for towers to accommodate both the Donalsonville and Sasser allotments. We also find that the allotment of Channel 298A to Donalsonville would be short-spaced to an application for Channel 299C3 at Sasser, Georgia. Therefore, in order to resolve the technical conflicts between Seminole's proposal to allot Channel 298A to Donalsonville and an application for Channel 299C3 at Sasser, Georgia, we have sought an alternate channel for Donalsonville. An engineering analysis has revealed that Channel 271A can be allotted at Donalsonville, Georgia, as that community's second local FM service. The Commission may allot an alternate channel on its own motion in order to resolve conflicts between proposals. *See Pinewood, South Carolina*, 5 FCC Rcd 7609 (1990). In addition, this action conforms to the Commission's policy of accommodating pending applications wherever possible. *See Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments (MO&O)*, 8 FCC Rcd 4743 (1993).[2]

5. We believe the public interest would be served by the allotment of Channel 271A to Donalsonville as that community's second local FM service. Channel 271A can be allotted to Donalsonville in compliance with the Commission's minimum distance separation requirements with a

[1] In response to the *Notice*, Petitioner provided an affidavit verifying the statements in its petition.

[2] As for EME's allegations regarding Seminole's lack of candor the Commission has stated before, "The mere fact that a party in one proceeding filed a pleading in which it states an interest in applying for a station, but subsequently fails to do so, is not sufficient evidence, by itself, of misrepresentation. On the other hand, where there is direct evidence of misrepresentation, or evidence of a pattern of filings in which a party expresses an interest in an allotment and either voluntarily dismisses its proposal prior to action in the allotment proceeding or fails to file an application, a question may arise as to whether the party is advancing proposals in good faith." We see no evidence of such a pattern in this case and accordingly find that no lack of candor is involved here. We reiterate that abuse of our processes is considered a material misrepresentation and may subject a petitioner to prosecution pursuant to Commission rules. *See Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3915 (1990).

site restriction of 7.2 kilometers (4.5 miles) northwest,[3] in order to avoid short-spacings to a construction permit for Station WWSG(FM), Channel 271A, Sylvester, Georgia, and the licensed site for Station WPHK(FM), Channel 272A, Blountstown, Florida.

6. Accordingly, pursuant to the authority contained in Sections (4i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 24, 1994,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Donalsonville, Georgia | 271A, 292A |

7. The window period for filing applications for Channel 271A will open on **January 25, 1994,** and close on **February 24, 1994**.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[3] The coordinates for Channel 271A at Donalsonville are North Latitude 31-05-32 and West Longitude 84-55-55.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-138**

In the Matter of

Amendment of Section 73.202(b), RM-8225
Table of Allotments,
FM Broadcast Stations.
(Lahoma, Oklahoma)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: November 4, 1993; Released: December 8, 1993**

By the Assistant Chief, Allocations Branch:

1. At the request of Donald W. McCoy ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 3882 (1993), proposing the substitution of Channel 239C3 for Channel 239A at Lahoma, Oklahoma, and the modification of Station KMKZ's construction permit to specify operation on the higher class channel. Petitioner filed comments reiterating his intention to apply for the channel, if allotted.[1] No other comments were received.

2. We believe the public interest would be served by substituting Channel 239C3 for Channel 239A at Lahoma since it will provide the community with a wide coverage area FM service. As proposed, we will also modify Station KMKZ's construction permit to specify Channel 239C3.

**Technical Summary**

3. Channel 239C3 can be allotted to the community in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.8 kilometers (3 miles) northeast to accommodate petitioner's desired transmitter site.[2]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 24, 1994,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Lahoma, Oklahoma | 239C3 |

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Donald W. McCoy for Station KMKZ, Lahoma, Oklahoma, IS MODIFIED to specify operation on Channel 239C3, in lieu of Channel 239A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Donald W. McCoy, permittee of Station KMKZ, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.4M

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Petitioner's comments were late-filed. However, we will accept the comments for the purpose of expressing continuing interest since the allotment is unopposed and can be made without adversely affecting any other proposal. In addition, petitioner complied with the request that he submit an affidavit verifying that the information contained in his petition is accurate to the best of his knowledge, as required by Section 1.52 of the Commission's Rules.

[2] The coordinates for Channel 239C3 at Lahoma are North Latitude 36-25-00 and West Longitude 98-03-00.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-122**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-8216 |
| Table of Allotments, | RM-8300 |
| FM Broadcast Stations. | |
| (Clarkrange and | |
| Monterey, Tennessee[1]) | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: November 3, 1993; Released: December 8, 1993**

By the Assistant Chief, Allocations Branch:

1. At the request of New Hope Radio ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 3534 (1993), proposing the allotment of Channel 284A to Clarkrange, Tennessee, as the community's first local aural transmission service. Petitioner filed comments restating its interest to apply for the channel, if allotted. Castle Communications filed supporting comments expressing an interest in applying for Channel 284A at Clarkrange. Petitioner filed a counterproposal requesting the allotment of Channel 284A at Monterey, Tennessee, in the alternative.[2] No other comments were filed.

2. In the *Notice*, petitioner was requested to furnish data to support that Clarkrange is a community since it is not incorporated or listed in the U.S. Census. Specifically, petitioner was requested to provide information as to the social, economic, cultural or governmental indicia to warrant a clear determination that Clarkrange is community for allotment purposes. Petitioner submits that Clarkrange has ascertainable borders, its own post office and zip code, churches, business establishments, schools, library, volunteer fire department, and a local Disabled American Veterans chapter. Further, petitioner notes that Clarkrange is served by the Twin Lakes Telephone Cooperative, and has its own exchange, and the head-end of the Big South Fork Cable TV Company is located in Clarkrange. In addition, petitioner notes that Clarkrange is served by a newspaper, "Voice of the Range" which is published monthly during the school year by students at Clarkrange High School. Petitioner states that in the event the Commission determines that Clarkrange is not a community for allotment purposes, it alternatively proposes the allotment of Channel 284A to Monterey, Tennessee, as that community's first local competitive service. In support of this counterproposal petitioner states that Monterey is a community for allotment purposes and is currently served by Station WKXD-FM.

3. Based upon the showing submitted by petitioner, we do not believe that Clarkrange is a community for allotment purposes. The Commission's long standing policy is to allot channels to communities composed of geographically identifiable population groupings. This requirement is generally satisfied if the proposed community is either incorporated or listed in the U.S. Census. Although the 1992 *Rand McNally Commercial Atlas* lists Clarkrange as having a population of 250, the town is neither incorporated nor listed in the U.S. Census. In this regard, the Commission has stated that mere geographical location is not sufficient to establish "community status." *See Vimville, Mississippi*, 48 FR 5974 (1983), and *Hannibal, Ohio*, 6 FCC Rcd 2144 (1991). In addition, petitioner has not shown other indicia of community status such as political, social, or business organizations, or provided the testimony of local residents. *See Trade, Tennessee and Beech Mountain, North Carolina*, 6 FCC Rcd 5835 (1991). It appears that there is no local government and that there are no community organizations such as a Chamber of Commerce, Rotary Club, Lion's Club or municipal services. Water is provided by Fentress County and fire emergency service is provided by a volunteer fire department. Since petitioner provided photographs of the Clarkrange Elementary School and Clarkrange High School, we requested information from the high school as to the nature of its educational boundaries. We were informed by the principal, that the high school is considered a "regional high school" which serves one-fourth of the county with no local administration. Although petitioner states Clarkrange has a post office, it has not provided any information denoting the importance of the post office's location at Clarkrange. The Commission has stated the presence of a post office and a zip code is not sufficient to establish community status. *See Hannibal, Ohio, supra*.

4. Having determined that Clarkrange is not eligible for an FM allotment, we believe the public interest would be served by allotting Channel 284A to Monterey, Tennessee, since it could provide the community with its first competitive service. Channel 284A can be allotted to Monterey in compliance with the Commission's minimum distance separation requirements with a site restriction of 14.6 kilometers (9.0 miles) northeast in order to avoid a short-spacing to the construction permit for Station WSGM-FM, Channel 284A, Coalmont, Tennessee.[3]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 24, 1994,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Monterey, Tennessee | 295C2, 284A |

[1] The community of Monterey, Tennessee, has been added to the caption.

[2] Public Notice of the counterproposal was given on July 29, 1993 (corrected on August 3, 1993) Report No. 1955.

[3] The coordinates for Channel 284A at Monterey, Tennessee are 36-15-29 and 85-10-48.

6. The window period for filing applications will open on **January 25, 1994,** and close on **February 24, 1994**.

7. IT IS FURTHER ORDERED, That the petition for Rule Making filed by New Hope Radio (RM-8216), requesting the allotment of Channel 284A to Clarkrange, Tennessee.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-295**

In the Matter of

Amendment of Section 73.202(b), RM-8362
Table of Allotments,
FM Broadcast Stations.
(San Clemente, California)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: November 5, 1993; Released: December 8, 1993**

**Comment Date: January 31, 1994**
**Reply Comment Date: February 15, 1994**

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is the *Memorandum Opinion and Order* in MM Docket No. 89-503, directing the initiation of a notice and comment rule making proceeding proposing the deletion of Channel 285A, San Clemente, California, from the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See* 8 FCC Rcd 3123 (1993). The Commission's directive is based upon the evidence and findings adduced in the context of the comparative proceeding in MM Docket No. 89-503, which ultimately led to an affirmance of the denial of two comparative applications for Channel 285A at San Clemente premised upon the applicants' failure to specify sites complying with the requirements of Section 73.207 of the Commission's Rules, or to justify waivers thereof. *See On the Beach Broadcasting*, 7 FCC Rcd 1346 (Rev. Bd., 1992).

**BACKGROUND**

2. In 1985, the Commission, acting in response to a rule making request, allotted Channel 285A to San Clemente, California, as its second local FM service at a restricted site located 8.9 kilometers (5.5 miles) southeast of the community.[1] *See San Clemente, California (Report and Order)*, 50 FR 8226, published March 1, 1985, *recon. denied*, Mimeo No. 6821, August 13, 1986, *review denied*, 2 FCC Rcd 2514 (1987), *recon. denied*, 3 FCC Rcd 6728 (1988), *appeal dismissed sub nom. Mount Wilson FM Broadcasters, Inc. v. F.C.C.*, 884 F.2d 1462 (D.C. Cir. 1989). Due to spacing constraints to Stations KDES(FM), Channel 284B, Palm Springs, California, and KCBQ-FM, Channel 287B, San Diego, California, that site, which is located within the boundaries of the Camp Pendleton Marine Corps compound, was the only available location for a transmitter site that would comply with the minimum distance separation requirements of Section 73.207 of the Commission's Rules. The allotment was made based upon the reasonable likelihood, as represented by a military official, that a site on Camp Pendleton might be made available for broadcast use. However, the U.S. Marine Corps strongly opposed the applications filed which proposed sites on Camp Pendleton, stating that they would not approve the erection of a commercial broadcast tower on military land to accommodate Channel 285A.[2]

3. As a result of the military's determination, a majority of the applicants for the allotment requested waivers of Section 73.207 to permit short-spacings ranging in distance from 4.1 and 5.9 kilometers to Station KKGO(FM), Channel 286B, Los Angeles, California. Although one applicant had specified a site allegedly on non-military property which required a waiver of the city-grade coverage requirements of Section 73.315 of the Commission's Rules, it was subsequently demonstrated that the purportedly conforming site was in fact within the boundaries of Camp Pendleton and unavailable for broadcast use. Regardless, the allotment was upheld on review by the Commission on the grounds that it was correctly made based on a factual determination that was reasonable at that time, and because it would have been unfair to rescind the allotment without considering the applicants' designated short-spaced sites outside of Camp Pendleton and their associated waiver requests. *See San Clemente, California*, 3 FCC Rcd at 6728, 6729.

4. Among the issues specified in the *Hearing Designation Order* was whether the applicants' proposals conformed to the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, and, if not, whether circumstances existed to warrant waivers. *See Hearing Designation Order*, 4 FCC Rcd 8399 (1989).

5. On the basis of a comparative hearing the Administrative Law Judge ("ALJ") determined that none of the applicants demonstrated that the public interest benefits accruing from a grant of their waiver requests were sufficiently compelling to offset the magnitude of the proposed spacing deficiency.[3] *See, Megamedia*, 67 FCC 2d 1527

[1] Coordinates specified for Channel 285A at San Clemente are 33-22-34 and 117-32-20.

[2] On a previous occasion occurring approximately twenty-six years ago, the Commission considered a request to allot FM Channel 285A to San Clemente. At that time, it was determined that spacing constraints would have confined a transmitter site for Channel 285A to Camp Pendleton. Recognizing that such a site would be unavailable for civilian use, the petitioner requested a waiver of Section 73.207 of the Commission's Rules to accommodate Channel 285A, while a second petitioner requested the reallotment of Channel 300 from Lancaster to San Clemente to accommodate the desire to provide San Clemente with FM service. In view of the unavailability of a fully-spaced site on land outside of Camp Pendleton to accommodate Channel 285A, that request was dismissed and Channel 300 was reallotted to San Clemente instead. *See* 2 FCC 2d 647 (1966).

[3] Specifically, the applicants specified a site on Clemente Peak, located 61.35 miles from grandfathered Station KKGO(FM), Channel 286B, Los Angeles, California. A distance of 65 miles is required between first adjacent Class A and B channels. The ALJ found that by employing the "ratio method" favored by the applicants, operation from the Clemente Peak site would cause interfrence to 3.4% of the total population, comprising 330,551 persons within the protected contour of Station KKGO(FM), and 3.8% or 430 sq. km. of the area served by Station KKGO(FM). Moreover, use of the Clemente Peak site would create interference by Station KKGO(FM) to 26.4% of the pop-

(1978); *Townsend Broadcasting 7 Corp.*, 62 F.C.C. 511 (1976). The ALJ also found that all of the applicants failed to demonstrate that there were no suitable fully-spaced or less short spaced sites available. *See Tri-Valley B/casting Co.*, 66 R.R. 2d 1046 (1989).[4] [5] Therefore, the applications were denied. *On the Beach Broadcasting*, 6 FCC Rcd 5221 (1991).

6. The Review Board upheld the ALJ's decision on review, finding that the applicants failed to justify their waiver requests or demonstrate that there were sufficiently compelling public interest benefits to be obtained from the proposals to offset the extent of the potential interference that would be created to, and received from Station KKGO(FM). *See* 7 FCC Rcd 1346 (1992).

7. The Commission affirmed the decisions below. In reaching its conclusion, the Commission determined that unlike the facts in *Tri-Valley*, *supra*, wherein the applicant made a compelling showing in support of a waiver of Section 73.207, there were no comparable public interest benefits demonstrated to justify the requested waivers here. The Commission found that in addition to the 42,147 persons within the protected contours of the applicants' proposed facilities who would not be able to receive an adequate signal, even if the applicants were able to provide an interference-free signal to the 160,000 persons within their proposed service area, more than double that number, some 330,551 persons, would lose existing service from Station KGGO(FM). Therefore, the Commission reaffirmed its conclusion that the applicants did not demonstrate that there were compelling public interest benefits to surmount the critical interference considerations, especially since San Clemente has local radio service, and the community is served by in excess of thirty reception services. *See On the Beach Broadcasting*, 8 FCC Rcd at 3127.

8. In light of the fact that throughout the history of this proceeding it was demonstrated that no fully spaced sites for Channel 285A at San Clemente were available outside the confines of Camp Pendleton, in addition to the applicants' failure to establish sufficiently compelling public interest benefits to justify waivers of Section 73.207 of the Rules, the Commision concluded that the allotment may never be utilized by a properly spaced station. *See* 8 FCC Rcd 3123, 3128 (1993). That determination was reinforced by the persistent and intense opposition of the U.S. Marine Corps to the construction of a commercial broadcast tower on military land. Therefore, the Commission stated that the allotment of Channel 285A at San Clemente may no longer serve the public interest and directed the initiation of this proceeding looking toward its deletion from the Table of FM Allotments. *See* Section 1.411 of the Commission's Rules; *Amendment of Section 73.202(b) (Pinckneyville, Illinois )*, 41 RR 2d 69 (1977).

9. In accordance with the above, we shall invite comments on the proposal to delete Channel 285A at San Clemente, California. Any party filing an expression of interest in retaining Channel 285A at San Clemente will be required to provide evidence that military policy against allowing a commercial transmitter to be located on Camp Pendleton has changed.[6] Therefore, the retention of Channel 285A at San Clemente will require the demonstration by any interested party of the existence of a fully spaced site outside of the boundaries of Camp Pendleton. Additionally, any expressions of interest specifying sites conforming with the minimum distance separation requirements of Section 73.207(b) in response to this *Notice* will be required to submit specific showings to demonstrate the ability to provide a 3.16 mV/m contour over the entire principal community of San Clemente, as required pursuant to Section 73.315 of the Commission's Rules. Moreover, although site certification is generally not required in the context of a rule making proceeding, we believe the facts in this instance warrant a departure from that policy. Therefore, any interested party will be required to provide information demonstrating that it has taken positive measures to obtain assurances from the owner of its proposed site that it will be able to buy or lease the location specified in its comments. Failure to provide the requested information under the cited circumstances may result in a rejection of the expression(s) of interest.

10. In view of the above, we shall propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to San Clemente, California, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| San Clemente, California | 285A, 300B | 300B |

11. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein.

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ulation, or 42,147 persons, and 14% of the area, or 81 sq. km. served by the proposed short-spaced San Clemente stations. Using the "contour method" the ALJ stated that the San Clemente site would cause interference to 888,777 persons within the area served by Station KKGO(FM). Conversely, Station KKGO(FM) would cause interference to 124,944 persons (78.3%) and 51.4% of the area to be served by the proposed short-spaced San Clemente stations. Thus, the ALJ determined that as the degree of interference implicated was clearly unacceptable, and no showing was made regarding the unavailability of lesser short-spaced sites, the applicants failed to justify their requests for waiver of Section 73.207 or to demonstrate any sufficiently compelling public interest factors to offset the magnitude of the spacing deficiency proposed. Therefore, the applications were denied.

[4] Although one applicant sought to employ a directional antenna to afford protection to Station KKGO(FM), its amendment was rejected by the ALJ for failure to comply with the provisions of Section 73.215(b)(2)(ii) to provide the requisite contour protection to Station KKGO(FM) based upon the maximum ERP for a Class B station of 50 kW, in calculating the grandfathered station's protected contour.

[5] It should also be noted that the record in MM Docket No. 89-503 established that other less short-spaced locations outside of Camp Pendleton are not feasible because of a tall ridge lying between such sites and San Clemente. Thus, it was determined that only a tall tower, which is not considered to be economically feasible, could overcome the height of this ridge. *See* 6 FCC Rcd 5221 at para. 7.

[6] *Cf. Crestview and Westbay, Florida*, 7 FCC Rcd 3059 (1992) (proposed transmitter site on a military base did not constitute an available site since it was improbable that authorization would be given for a commercial transmitter site on military property).

12. Interested parties may file comments on or before **January 31, 1994,** and reply comments on or before **February 15, 1994,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

13. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

14. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 91-220**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-7746 |
| Table of Allotments, | RM-7842 |
| FM Broadcast Stations. | |
| (Bishop and Benavides, Texas) | |

**MEMORANDUM OPINION AND ORDER**
**(Proceeding Terminated)**

**Adopted: November 8, 1993; Released: December 8, 1993**

By the Chief, Policy and Rules Division:

1. Before the Commission is a petition for reconsideration of the *Report and Order* in this proceeding, 7 FCC 5000 (1992), filed by Cismek Corporation ("Cismek"), licensee of Station KFLZ-FM, Channel 269A, Bishop, Texas. The *Report and Order* allotted Channel 299C2 to Benavides, Texas, as that community's first aural transmission service.[1] Humberto Lopez d/b/a Benavides Communications ("BC") filed an opposition to the petition for reconsideration, as well as a motion for late acceptance of opposition.

2. *Background.* This proceeding began with the filing of a petition for rule making by Cismek, proposing the substitution of Channel 299C3 for Channel 296A at Bishop, Texas, and the modification of Station KFLZ-FM's license to specify operation on the higher class channel. In response to that petition, the Commission issued a *Notice of Proposed Rule Making*, 6 FCC Rcd 4517 (1991). Benavides Broadcasting Associates ("BBA") filed a counterproposal requesting the allotment of Channel 299C2 to Benavides, Texas, as that community's first local aural transmission service.[2] Cismek filed comments stating that BBA's counterproposal was defective since it did not comply with the requirements of Section 1.52 of the Commission's Rules regarding subscription and verification in that BBA failed to include its address in its counterproposal. However, in the *Report and Order* the Commission noted that the Public Notice announcing BBA's counterproposal included the address of the counterproponent, and that since no prejudice had resulted to any party, it would consider the counterproposal. The Commission comparatively considered the proposals and allotted Channel 299C2 to Benavides under the FM allotment priorities[3] as a first local aural transmission service.

3. In support of its petition for reconsideration, Cismek contends that the Commission accepted BBA's defective counterproposal even though the counterproposal failed to comply with the provisions of Section 1.52 of the Commission's Rules. Cismek states that acceptance of a proposal which fails to provide any address or verification is inconsistent with the standard applied to other counterproposals in other proceedings, citing *Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3910 (1990). BC's opposition notes that BBA's counterproposal was consistent with the provisions of Section 1.52 since BBA was represented by counsel who file a transmittal letter with the Commission containing counsel's address. BC further argues that since BBA was represented by counsel, it did not need to verify its counterproposal.

4. *Discussion.* After a thorough review of the pleadings in this case, we will deny Cismek's petition for reconsideration. We disagree that the staff erred in accepting BBA's counterproposal. Section 1.52 of the Commission's Rules requires that the original of any document filed by any party represented by counsel be signed by at least one attorney of record in his individual name and whose address shall be stated. The Rules further state that a document signed by the attorney for a party need not be verified or accompanied by affidavit except when otherwise specifically provided by rule or statute. In this case, BBA was represented by counsel, who, consistent with the provisions of Section 1.52, did sign the BBA counterproposal on behalf of the counterproponent and state his address.

5. In view of the above, IT IS ORDERED, That the petition for Reconsideration filed by Cismek Corporation IS DENIED.

6. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[1] Public Notice of the petition for reconsideration was given on October 19, 1992, Report No. 1913.

[2] The FM allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local transmission service; (4) other public interest matters. [Co-equal weight is given to priorities (2) and (3).] *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

[3] *See Benton Arkansas, et al;* 3 FCC Rcd 4840 (1988), *recon. denied*, 7 FCC Rcd 2555 (1992).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 92-195**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-7091 |
| Table of Allotments, | RM-7146 |
| FM Broadcast Stations. | RM-8123 |
| (Beverly Hills, Chiefland, Holiday, | RM-8124 |
| Micanopy, and Sarasota, Florida) | |

**MEMORANDUM OPINION AND ORDER**
**(Proceeding Terminated)**

**Adopted: November 8, 1993; Released: December 8, 1993**

By the Chief, Policy and Rules Division:

1. The Commission has before it the Petition for Reconsideration filed by Dickerson Broadcasting, Inc. ("Dickerson"), licensee of Station WEAG-FM, Channel 292A, Starke, Florida, directed to the *Report and Order* in this proceeding, 8 FCC Rcd 2197 (1993). Sarasota-FM, Inc., Gator Broadcasting Corporation, and Heart of Citrus, Inc. filed a joint Opposition to Petition for Reconsideration. Pasco Pinellas Broadcasting Company filed an Opposition to Petition for Reconsideration. Dickerson filed a Joint Reply to Opposition to Petition for Reconsideration. For the reasons discussed below, we deny the Petition for Reconsideration.

## BACKGROUND

2. In response to a Petition for Rule Making filed September 29, 1989, Heart of Citrus, Inc. ("Heart of Citrus"), permittee of Station WXOF (formerly WPDS), Channel 246A, Beverly Hills, Florida, the *Notice of Proposed Rule Making*, 7 FCC Rcd 5910 (1992), in this proceeding proposed the substitution of Channel 246C3 for Channel 246A at Beverly Hills, and modification of the Station WXOF construction permit to specify operation on Channel 246C3. In addition to comments and/or reply comments from Heart of Citrus, Highlands Media Company, Inc., Roper Broadcasting, Inc., WGUL-FM, Inc., White Construction Company, and Pasco Pinellas Broadcasting Company, we received two counterproposals proposing upgrades at four communities. The first counterproposal was filed jointly by Sarasota-FM, Inc., licensee of Station WSRZ, Channel 292A, Sarasota, Florida, and Gator Broadcasting Corporation, licensee of Station WRRX, Channel 249A, Micanopy, Florida. That counterproposal proposed an alternate Channel 292C3 upgrade at Beverly Hills in order to accommodate a Channel 246C2 upgrade for Station WLVU, Channel 292A, Holiday, Florida, and a Channel 300A substitution for Station WLQH, Channel 247A, Chiefland, Florida. In turn, these channel substitutions permitted the proposed Channel 293C2 upgrade for Station WSRZ, Channel 292A, Sarasota, Florida, and a Channel 247C2 upgrade for Station WRRX, Channel 249A, Micanopy, Florida. The second counterproposal was filed by Heart of Citrus proposing a Channel 246C2 upgrade for Station WXOF. The *Report and Order* upgraded Station WRRX, Micanopy, to Channel 247C2; Station WSRZ, Sarasota, to Channel 293C2; Station WLVU, Holiday, to Channel 246C2; and Station WXOF, Beverly Hills, to Channel 292C3.[1] The Dickerson Petition for Reconsideration is directed against the Channel 292C3 upgrade at Beverly Hills.[2]

3. In support of its Petition for Reconsideration, Dickerson argues that the Channel 292C3 allotment at Beverly Hills was made without notice, and that the allotment poses an impediment to its efforts to increase the operating power of Station WEAG-FM to 6 kilowatts.[3] Moreover, Dickerson contends that there was no basis to apply the spacing requirements of Section 73.213(c)(1) of the Rules with respect to the Channel 292C3 allotment because only the Channel 246C3 proposal was filed prior to October 2, 1989.[4] We will consider these arguments *seriatim*.

4. The first argument advanced by Dickerson alleging a lack of notice with respect to a Channel 292C3 allotment at Beverly Hills is not well taken for two reasons. First, as

[1] In order to accommodate the Channel 247C2 upgrade for Station WRRX at Micanopy, the *Report and Order* also substituted Channel 300A for Channel 247A at Chiefland, Florida, and modified the construction permit of Station WLQH to specify operation on Channel 300A. In addition, the *Report and Order* granted the Channel 292C3 upgrade for Station WXOF at Beverly Hills in conjunction with the Channel 246C2 upgrade for Station WLVU at Holiday. These proposals were an "incompatible channel swap" as envisioned in *Modification of FM Broadcast Licenses to Higher Class Co-Channel or Adjacent Channel*, 60 RR2d 114,120 (1986). *See Holiday, Florida*, 7 FCC Rcd 2557 (1992); *see also Clincho, Virginia*, 6 FCC Rcd 3732 (1991). As such, these nonadjacent upgrades were granted without opening either proposed upgrade to other expressions of interest.

[2] The Channel 292C3 allotment at Beverly Hills does not meet the 142-kilometer separation requirement now set forth in Section 73.207 of the Rules with respect to Station WEAG-FM. However, we specifically stated in the *Report and Order* that because the petition for rule making proposing the Class C3 upgrade for Station WXOF was filed prior to the October 2, 1989, effective date of the new FM spacing requirements, Heart of Citrus, Inc. may avail itself of the former 138-kilometer FM spacing requirement now set forth in Section 73.213(c)(1) of the Rules in regard to Station WEAG-FM.

[3] In this regard, we note that a 6-kilowatt operation for Station WEAG-FM would result in additional service to approximately 28,554 persons, while a Class C3 upgrade for Station WXOF will result in additional service to approximately 99,884 persons.

[4] In addition to expressing its support for a blanket 6-kilowatt power increase for all Class A FM stations, Dickerson addresses the impact of existing FM allotments at Kingsland, Georgia, Five Points, Florida, Cross City, Florida, and Pointe Vedra Beach, Florida, on its efforts to increase operating power to 6 kilowatts. Neither these allotments nor the issue of a blanket 6-kilowatt power increase was before the Commission in MM Docket No. 92-195. As such, these matters will not be considered in resolving the Dickerson Petition for Reconsideration in this proceeding.

noted earlier, the *Notice* did, in fact, propose a Channel 246C3 upgrade for Station WXOF. However, in paragraph 3(c) of the Appendix to the *Notice*, we expressly alerted all potentially interested parties that "the filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved." A summary of the *Notice* was published in the Federal Register on September 15, 1992, 57 FR 42537, thereby affording all interested parties notice of the proposed upgrade. Second, we are not required by either our Rules or the Administrative Procedure Act to issue a separate *Notice* for every channel under consideration. *See Pinewood, South Carolina* , 5 FCC Rcd 7609 (1990); citing *Medford and Grants Pass, Oregon*, 45 RR 2d 359 (1979); *Pensacola, Florida*, 62 RR 2d 535 (1982). The *Notice* elicited counterproposals and announced the possibility of allotting alternate channels to any community in MM Docket No. 92-195. The fact that the *Report and Order* allotted an alternate channel to Beverly Hills which, in turn, precludes any subsequent consideration of a 6-kilowatt operation for Station WEAG-FM, was merely doing that which we announced that we could do. As such, this procedure meets the "logical outgrowth" test applied to determine whether a rule making action is based on adequate notice and opportunity for public participation. *See Weyerhaeuser Company v. Costle*, 590 F.2d 1011,1031 (D.C. Cir. 1978); *Owensboro on the Air v. United States*, 262 F.2d 702 (D.C Cir. 1958).

5. It is also our view that we correctly applied the former FM spacing requirements now set forth in Section 73.213(c)(1) of the Rules with respect to the Channel 292C3 allotment at Beverly Hills. As stated earlier, Heart of Citrus filed its Petition for Rule Making on September 29, 1989. In accordance with *Amendment of Part 73 of the Rules to Provide for an Additional FM Station Class (Class C3) and to Increase the Maximum Transmitting Power for Class A FM Stations*, 4 FCC Rcd 6375 (1989) ("*Mileage Separation Order*"), the Heart of Citrus Petition for Rule Making, and all other petitions for rule making filed prior to October 2, 1989, were processed pursuant to the rules then in effect. The former FM spacing requirements specified a 138-kilometer separation between a Class A and a Class C3 co-channel FM allotment. Furthermore, the procedure discussed in the preceding paragraph for considering alternate channels was in effect at the time Heart of Citrus filed its Petition for Rule Making and remains in effect. The Heart of Citrus Petition for Rule Making was merely examined and considered in accordance with the rules in effect on the date it was filed. There is nothing in *Mileage Separation Order* that would suggest that we would not follow our procedures with respect to considering alternate channels in a rule making proceeding.

6. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by Dickerson Broadcasting, Inc., IS DENIED.

7. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 91-273**

In the Matter of

Amendment of Part 63 of the
Commission's Rules to Provide for
Notification by Common Carriers
of Service Disruptions

**MEMORANDUM OPINION AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING**

**Adopted: November 5, 1993; Released: December 1, 1993**

**Comment Date: January 21, 1994**
**Reply Date: February 22, 19944**

By the Commission: Chairman Quello and Commissioners Barrett and Duggan issuing separate statements.

## I. INTRODUCTION

1. This *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking (Notice)* proposes to amend the outage reporting requirements, 47 C.F.R. §63.100, set forth in our *Report and Order* in this proceeding, 7 FCC Rcd 2010 (1992), (*Report and Order*). Additionally, we deny the petition for reconsideration of the *Report and Order* filed by Tele-Communications Association (TCA), and grant the petition for reconsideration filed by United States Telephone Association (USTA).[1]

## II. BACKGROUND

2. In the *Report and Order*, the Commission added section 63.100 to its rules requiring that local exchange or interexchange common carriers operating either transmission or switching facilities notify the Commission within 90 minutes if they experience service outages potentially affecting 50,000 or more customers and lasting 30 or more minutes. Additionally, the Commission referred to the Network Reliability Council (NRC)[2] the questions of whether the reporting threshold should be lower than 50,000 customers, and whether a separate threshold for reporting outages affecting 911 services or major airports should be adopted.

3. On May 11, 1992, the NRC forwarded to the Commission its initial recommendation that the filing threshold for initial service disruption reports (due 90 minutes after commencement of an outage) remain at 50,000 customers, but on a 6 month investigatory basis, the threshold for final service disruption reports (due 30 days after an outage) be lowered to 30,000 customers. The NRC stated that it would make further recommendations at the end of the six month period, based on experience with the lower reporting standard. The NRC further recommended that any outage affecting special offices and facilities must be reported regardless of the number of customers affected.[3]

4. On October 19, 1992, the NRC recommended to the Commission that mission-affecting outages lasting 30 minutes or more at nuclear power plants, major military installations, and key government facilities were to be reported by the affected facility to the National Communications System (NCS),[4] which would either forward a report of the outage to the Commission that supplies all the information required by § 63.100 of the rules, forward an edited version, or hold the report at the NCS, depending on the degree to which notification of the outage might affect NS/EP concerns.[5]

5. On December 29, 1992, the NRC forwarded to the Commission the final report of its Threshold Reporting Group (TRG), which contained its final outage reporting recommendations, as follows:[6]

> a) that carriers report to the Commission within 90 minutes outages lasting 30 minutes or more and potentially affecting 50,000 or more customers, with a final report to be filed within 30 days, pursuant to the *Report and Order*, but that the Commission consider extending the 90 minute deadline for the initial reports to 120 minutes;

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[1] TCA's petition was opposed by AT&T and MCI, and TCA has replied. Comments in support of USTA's petition were filed by Metropolitan Fiber Systems, Inc. (MFS), BellSouth Corporation (BellSouth) and Central Telephone Company (Centel), and reply comments were filed by USTA, Southwestern Bell Telephone Company (Southwestern), and Pacific Bell and Nevada Bell (Pacific).

[2] The Council was formed to provide the Commission and the industry with recommendations as to how public telephone network outages can be avoided and, if they occur, how their impact can be minimized. *See Report and Order* at para. 15.

[3] Letter from Paul H. Henson, Chairman, Network Reliability Council, to Chairman, Federal Communications Commission, May 11, 1992. This document, along with other Council documents mentioned herein may be copied in room 6325 of the Commission's offices at 2025 M Street N.W., Washington, D.C. 20554 or acquired through the Commission's duplicating contractor, ITS, Inc., at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800.

[4] The NCS consists of representatives from twenty-three federal departments, agencies or entities which lease telecommunications facilities significant to national security and emergency preparedness (NS/EP). The mission of the NCS is to coordinate planning for and provision of NS/EP in all circumstances.

[5] Letter from Paul H. Henson, Chairman, Network Reliability Council, to Chairman, Federal Communications Commission, October 19, 1992.

[6] Letter from Paul H. Henson, Chairman, Network Reliability Council, to Chairman, Federal Communications Commission, December 29, 1992.

b) that carriers report special offices and facilities[7] failures regardless of the number of customers affected, using the alternative procedures for reporting failures with NS/EP implications as described in the October 19, 1992 recommendation;

c) that carriers notify the Commission within 3 days of any outage lasting 30 minutes or more and potentially affecting between 30,000 and 50,000 customers, and that carriers submit a final report of the outage to the Commission within 30 days;[8]

d) that interexchange carriers be permitted to use blocked calls to determine whether criteria for reporting an outage have been reached;

e) that for a period of one year, there be no confidentiality for reports of outages potentially affecting 30,000 to 50,000 customers, but that the issue be reexamined by the Commission at the end of that one-year period and that, if confidentiality is granted at that time, it be granted to all carriers;

f) that these thresholds be used to meet the needs of network reliability and Commission oversight and should not be taken as standards for levying fines and forfeitures.

## III. DISCUSSION

6. Since April, 1992, telecommunications common carriers have been required to report network outages potentially affecting 50,000 or more customers. Effective June 1, 1992, interexchange and local exchange carriers, working through the NRC, voluntarily expanded the reporting threshold: reports were added for outages affecting between 30,000 and 50,000 potential customers for at least 30 minutes. Also voluntarily added were reports of outages that affect special offices and facilities such as 911 emergency service, major airports, nuclear power plants and military bases, regardless of the number of customers involved. A summary of outage reports received through March 31, 1993, as categorized by the TRG,[9] is as follows:

Total outages in 359 days: 183

Location/cause of outage:

| | |
|---|---|
| Cable Cuts | 32.2% |
| Local Switch | 24.6% |
| SS7 | 13.1% |
| Tandem | 12.6% |
| General Facilities | 10.4% |
| Natural overload | 3.8% |
| Other overload | 2.7% |
| Other | .6% |
| Total: | 100.0% |

7. In May of 1993, the final reports of seven[10] other Network Reliability Council working groups were delivered to the Commission.[11] These working groups were organized through the Council's Steering Team to analyze and develop recommendations for the areas of greatest concern regarding network reliability. Separate studies were organized to examine Fiber Cable Systems (focus on cable cuts), Signaling Network Systems, Switching Systems (focus on software), Digital Cross-Connect Systems, Power Systems, Fire Prevention and E911 Systems. At the behest of the Council and after thorough investigation, the Steering Team had determined that these areas encompassed all major telephone service outages that had occurred over the last several years. The Steering Team assigned one of its own members as a "champion" to each of the working groups to coordinate its efforts with those of other groups, to draft initial issue statements and to recommend potential group chairmen and members with the required expertise and representational balance. The Steering Team asked all groups to draft a timetable of key milestones and to obtain early examples of best practices in their areas to share in their initial reports with the industry. Using the Total Quality Process, each group put a high priority on gathering outage data. Each group was provided a single point of contact for data collection for each company represented on the Council.

8. The Steering Team provided for third party aggregation of data in response to research requests and questionnaires submitted by the groups through Bellcore. Group status reports to the Team were presented monthly beginning in August of 1992. The methodology for each group's research proceeded from identification of other industry efforts to study reliability in their assigned areas, 8 through data collection and root cause analysis of the data, to the formulation of final Best Practices, key lessons and recommendations, including alternative ways to prevent and minimize problems. Each team was required to develop metrics and benchmarks for measuring the effectiveness of the solutions it discovered once they were implemented. In addition to overseeing and organizing this work, the Steering Team coordinated the compilation of the Mutual Aid and Restoration Compendium, conducted an investigation of other on-going domestic and international industry reliability efforts, developed a structure to work in conjunction with ATIS to track the success of recommendations once implemented and to update them in accordance with

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[7] "Special offices and facilities" are defined as major airports, major military installations, key government facilities, nuclear power plants and 911 tandems.

[8] Information proposed to be submitted for the 3 day notice would be somewhat less detailed than that now requested for the 90 minute initial service disruption reports.

[9] Final Recommendation of the Threshold Reporting Group of the Network Reliability Council, May 15, 1993, Charts 13 and 14, pp. 15-16, as updated in the TRG reports at the March 17 and April 14, 1993 meetings of the Network Reliability Council.

[10] The report of the eighth working group -- the Mutual Aid and Restoration Focus Team -- was delivered on March 3, 1993. That report outlined the various types of agreements, both formal and informal, that exist for mutual aid among carriers, other industry members and customers, including general recommendations, the advantages and disadvantages of each of the various types of agreements according to different circumstances, contact lists, recommendations for public education on finding alternative service during an outage and other aids for facilitating mutual aid when called for. This document will be periodically updated by the National Communications System and may be obtained through the Alliance for Telecommunications Industry Solutions (ATIS) Network Operations Forum (NOF) as part of the ATIS-NOF Network Management Contact Directory.

[11] Letter from Paul H. Henson, Chairman, Network Reliability Council to Chairman, Federal Communications Commission, May 11, 1993.

future developments after the dissolution of the Council. In addition, the Steering Team, in conjunction with the National Engineering Consortium, organized an extensive industry Symposium to present the Council's recommendations to the industry as a whole. The Council's findings and reports total more than 1,000 pages and are included in the publication *Network Reliability: A Report to the Nation.*[12]

9. *Cable Cuts:* A frequently occurring cause of reportable outages (32%) is damage to transmission cable, most of which results from fiber optic cable being dug up or cut during construction activity. Fiber optic transmission cable damage represents 59 of 183 outage incidents analyzed by the TRG. The Fiber Cable Focus Group has analyzed all fiber cut incidents reported to the FCC and, in addition, commissioned a much broader survey of cable cut incidents. The survey asked participating carriers to submit to Bellcore for aggregation extensive data on each fiber optic failure occurring in their network, whether or not the failure affected customer service. Failure was defined as any event that either 1) caused a fiber optic system to cease to operate to specifications, or 2) required timely maintenance activity. Extensive data on FCC reportable outages for the period between April 1, 1992 and August 31, 1992 was requested in addition to data on all fiber optic failures between September 1, 1992 and February 12, 1993. Some data were voluntarily submitted on non-FCC reportable failures prior to September 1, 1992. The Group also requested extensive and detailed data on the population of deployed fiber optic cable. Based on its analysis, the Team has prepared a series of recommendations which, it believes, if enacted, will lead to a significant decrease in the number of fiber cable failures. The recommendations include the following:

a) Legislation should be considered to secure consistent, enforceable requirements that excavators on utility rights-of-way notify all underground utilities at least two days prior to excavating and that an excavator failing to provide such notification is liable to pay full compensation for emergency restoration and repair of the facility to its condition prior to excavation. Legislation might also require responsible marking by utilities once facilities are located.[13]

b) Because much damage occurs even where notification is made (in 40 percent of the outages, notification was made), the following best practices must be observed. There should be permanent cable marking above ground[14] and markers twelve inches deep above cable below ground, right-of-way maintenance, accurate locate services by the utility, fiber route patrolling, hand-digging-only safety zones, land owner education, rodent-resistent shielded cables, separate pole lines for cable and secured and ventilated manholes.

c) There should be a benchmarking study by the Telecommunications Benchmarking Consortium to learn, among other things, how other non-telecommunications industry companies with distributed assets protect those assets.

10. *Switch Failures:* Another commonly occurring cause of reportable outages is switch failures. Although switching systems were found to average greater than 99.99 percent availability, local switch failures represent 24.6% of the outage incidents reported by local exchange carriers. The Switching Systems Focus Area Team has analyzed all switching failures reported to the Commission. In addition it gathered data on more than 5,000 outage incidents provided by 12 service providers and six systems suppliers and including outages one minute or longer in duration and impacting 1,000 or more lines. The Team found the four major contributors to switch outages are procedural errors, scheduled (maintenance) activity, hardware failure and software design. The dominant causes of switching failures are procedural errors. The primary cause of procedure-related outages is failure to use or improper use of Methods of Procedure for maintenance or system change activities. The Switching System Focus Area Team has made several recommendations regarding procedures including:

a) The elimination of "Telco Procedural Error" as a failure category, as this term makes the failure personal and limits the sharing of information required to identify root cause.

b) Enhancement of the existing service provider data collection process to identify root causes of outages due to procedural errors.

c) Preparation of methods of procedure for all hardware and generic software growth and change activities.

d) Prohibition of manual system initializations to clear alarm indications, back ground processes or software corruption, such as shutting off alarms and restarting equipment without correcting the fault, unless customer service is being drastically impacted.

e) Simplicity in developing procedures for maintenance, hardware growth and software changes.

f) Enhancement of existing or establishment of new standards for system robustness to prevent switching systems from allowing service-affecting activity without positive confirmation, i.e., a verification process.

The second most frequently occurring cause of switch failures is failure during scheduled events such as retrofits, generally performed during early morning hours. The primary cause of frequent scheduled outages is system design. With respect to such outages, the Focus Team has made the following recommendations:

[12] The publication may be obtained through the Information Director, Alliance for Telecommunications Industry Solutions, 1200 G Street, N.W., Suite 500, Washington, D.C., 20005, or as provided in note 3, *supra*.

[13] The Commission has forwarded to Congress the Fiber Cable Focus Group's report and the Council's deliberations recommending such legislation.

[14] The Team did not think that marking above ground was advisable in areas especially susceptible to vandalism.

g) The number of scheduled outages per switch per year should be reduced from the current level of 1.4 to 1.0 by 1995, and eliminated by the year 2000.

h) System suppliers should allow for "soft" activation rather than reinitialization, since the latter requires switch functions to be suspended entirely.

i) An on-line memory management capability should be provided that can reconfigure or expand memory without affecting call processing or billing.

j) Bellcore and industry technical literature must be reviewed for recommended practices which might inadvertently contribute to the number of scheduled outages.

k) Service providers should coordinate changes associated with service introduction with other necessary changes, permitting coordinated reinitializations in which a single outage would serve the objectives of both engineering and marketing.

l) The accuracy of service providers' manual processes must be improved to avoid the need to repeat processes.

m) A standardized form should be used to collect data on scheduled outages by system suppliers and service providers.

Software design was the third largest cause of switch failures. The primary causes of software design-related outages are data corruption (errors introduced into the software) and defective/delayed patches (sections of new software inserted into software to correct it that arrive late or are themselves defective). The Focus Team recommended the following:

n) Enhancement of software development methodology to insure effectiveness and continual improvement.

o) Formal design and code inspection as part of the software development methodology.

p) Formal root cause analysis for investigating outage root causes and recommending corrective actions.

q) Enhancement of test environments and scenarios to provide more realistic settings.

r) Software fault insertion testing, so that a system's reaction to and ability to withstand errors may be determined.

s) Clarification of fault tolerance requirements and standards.

t) Rigorous self-enforcement of design guidelines for system initializations.

u) Continuous review of field performance.

The last of the four major identified causes of switch failure is hardware. The primary causes of hardware-related outages are deficient fault isolation and/or recovery software. The Focus Team recommends:

v) Modifications of the data collection form so that organizations responsible for completing it are strongly encouraged to examine the outage from a root cause point of view.

w) Formulation of an industry definition of outage, with performance and reporting standards agreed upon and implemented.

x) Inclusion of specific information in hardware outage reports about the type of outage.

y) Immediate reporting to the equipment supplier of service interruptions of two minutes or more affecting over 500 lines, where there is evidence that the problem was triggered by a single hardware failure.

z) Early convergence of hardware and software fault recovery design processes.

11. *Power Systems:* Failures associated with power systems were responsible for 294 incidents reported to the Power Systems Focus Team. Like the other focus area groups, the Power Team supplemented the Commission's outage reports. The Team solicited data on outages and near outages, including the series of events that preceded outages, for incidents occurring between June 1990 and September 1992. All major local and interexchange carriers responded. On the basis of its analysis of these data and the FCC outage reports, the Team found that operational factors -- employee error, inadequate procedures, maintenance and alarm procedural errors -- accounted for 58 percent of reported outages. Engineering or design failures -- equipment malfunctions, sizing problems and design deficiencies -- accounted for 42 percent. The Team has assembled recommendations it believes will result in a significant decrease in the number of failures. It places highest priority on resolving operational factors related to human activity. Overall, it recommends that product design and selection be based on simplicity. It emphasizes the need to avoid single points of failure, the need for site-specific procedures and plans and observation of industry standards for network equipment building systems (NEBS) and DC power systems. It provided detailed recommendations in a variety of areas. The recommendations included the following:

a) Recommendations on alarms and power monitors include a well-conceived alarm strategy plan, with human factors taken into consideration. There should be redundant alarms. Alarm systems should be tested regularly. Modern improvements, such as remote centralized alarm monitoring, for monitoring power plant systems should be considered.

b) Recommendations for operations and maintenance include a call for a mandate from each carrier's top management for power programs, which tend not to attract high level interest normally. There should be well-defined practices and standards and well-trained special crews that are comfortable working with the power equipment. There should be a review and audit process of power plants to determine the need for improvements in both design and operations.

c) Recommendations for management of installation and removal work include defined standards and procedures. There should be a certification program. Risky work should be done at night. There are meters that can be clamped on to particular circuits to see whether they are alive or dead before removal; the use of such devices is recommended.

d) There should be electrical service priority for restoring power to carriers. The carriers need to let the power companies know where their sensitive loads

are. Particularly in large central offices, there should be feeds from a second substation if possible. There must be advance agreement of the carrier to cutting off of power for conservation by the power company and prior ignition of generators before power is cut.

e) Recommendations for standby engines include automatic operation of these engines in the case of power failure. These engines, however, are very complicated and can be automatically stopped by their self-protective systems. There should be easy manual operating procedures when required to bypass such systems. The Team also recommends that adequate fuel be maintained on the engine site, but that carriers avoid oversizing the tank such that there is stale fuel. There should be automatic reserves of lubrication oil for the extended operation of diesels. There should also be contingency plans for mobilizing portable engines. Such factors must be considered in advance. A routine maintenance program should provide for running the emergency generators about every two weeks with full transfer of the load so that their functionality can be fully tested.

f) Recommendations for buildings' AC systems include having two separate AC feeds where there are numerous rectifiers and critical systems. Many old and unreliable safety systems require closing the outside power source before inside power systems can be used; these should be replaced by automatic transfer switches. There should be tap boxes outside central offices for fast hook-up of portable engines. Finally, there should be a well-defined maintenance program for power plants.

g) Recommendations for DC power plants (batteries) include maintenance of a three hour minimum battery reserve. Existing national standards should be followed: for example, the standards for ventilation of the battery room to avoid battery explosion (batteries on charge boil off explosive hydrogen). Valve regulated batteries should have a device to monitor their temperature and remove power if they become too hot. Modernization programs should emphasize materials that require more oxygen than naturally exists in the atmosphere to support combustion. Finally, there should be smaller battery plants, which tend to be more reliable.

h) Recommendations for DC distribution systems include diverse feeds from batteries for SS7 links and other critical elements. There should be covers for circuit breakers so they are not inadvertently turned off and reset, which causes serious problems with some equipment. Fuse size should be chosen to cover the load, not the conductor, to insure that fuses blow when they should.

i) Recommendations for central office emergency procedures and contingency plans include detailed site-specific procedures for operating power systems under normal and emergency conditions. A fire emergency plan for disconnecting the AC and the DC power, and coordination with the local fire department should be maintained. The fire department should be called immediately when there are fire alarms. This may necessitate a reduction of false alarms. Carriers should investigate all outages and events that do not result in a loss of service, such as extended, unplanned operation on batteries, and maintain a review and audit program. The FCC outage reports are recommended as an industry metric.

12. *Signaling Systems:* Numerically, outages in signaling systems represented a relatively small number of incidents. However, within the last three years, two incidents associated with failures in network elements related to deployment of Signaling System 7 (SS7) led to outages of catastrophic proportions.[15] Concerns have been raised whether, with increasing interconnection and use of SS7, the public is exposed to unacceptable risks to telephone service reliability. Using the Total Quality Process employed by the other teams, the Signaling Team concluded that the SS7 network is reliable. Though past STP failure resulting from software faults relating to congestion control and recovery caused the majority of end office isolations, the Team found there were no service affecting outages associated with STPs in 1992. In addition to FCC reportable outages, the Team used Bellcore data from November 11, 1990 to June 30, 1992 and gathered data from the industry for failures occurring between January 1, 1991 and September 30, 1992. These latter data sources included information on outages and outage related events lasting longer than two minutes. The Team found 83 percent of SS7 isolations are due to signalling failures in the end office switches. It found service-affecting failures were primarily the result of procedural errors (39 percent) and software errors (29 percent). Lack of link diversity also has been a major contributor to service disruptions. On the basis of its analysis the Team formulated recommendations for ensuring improved reliability, including the following:

a) Carriers should assess their maintenance personnel's expertise, establish awareness training programs and send personnel to training programs. Training should emphasize detection of conditions requiring intervention, escalation procedures, manual recovery techniques and power equipment maintenance. Fault recovery actions relating to SS7 should be reviewed periodically to insure that the least complex strategies are being used for certain classes of failures. Initialization should be optimized to minimize service impact. SS7 related work should be scheduled during off hours. There should be special precautions established for carrying out maintenance of network elements that could have massive service impact. Sensitive SS7 equipment should be labeled as a safeguard.

b) SCP operators should have planned evaluations, maintenance and testing of the uninterruptable power supply.

[15] In January of 1990, AT&T suffered outages throughout its network when newly installed software caused malfunctions that resulted in more than 65 million blocked call attempts. In June and July of 1991, Bell Atlantic and Pacific Telesis experienced a number of incidents associated with newly installed software that resulted in more than 30 million blocked call attempts.

c) There must be increased commitment of personnel and resources across the industry for the Internetwork Interoperability Test Plan (IITP). Fault insertion software testing should be standard for suppliers. Test scripts and event simulations involving hardware and fault recovery software failures and stresses should be evaluated through the IITP.

d) SCPs should be placed in a central office environment, if possible, to take advantage of those offices' designs and procedures governing power, fires and the availability of maintenance personnel. There should be dedicated DS1 facilities for links to reduce the frequency of procedural activity on those links. Link diversity should be maintained. The Team has developed a compendium of best practices for accomplishing this.

13. *DCS Systems:* There were few FCC reported failures in digital cross connect systems (DCSs). Mean time between outages for a DCS average greater than twelve years. But single DCS units handle increasing volumes of traffic and outages of these units will become more critical in the future. Outages that do occur are sometimes long in duration. Therefore, the Steering Team designated a Digital Cross Connect Systems Focus Team. The DCS Team sent two questionnaires to industry members. The first attempted to assess the DCS population. The second requested details on every DCS ' related failure since June 1, 1991. The definition of failure did not require that they be service-affecting. There were 629 failure reports covering 2,598 DCSs. The Team found that more than 30 percent of the outages were the result of procedural errors -- mistakes made in routine maintenance, installation or growth activities; 20 to 30 percent were due to hardware and most of the remainder to software. Because of the increasing complexity of and reliance on DCSs, the Team recommended a "paradigm shift" in the way management treats DCS equipment. DCSs, the Team concluded, increasingly lend themselves more to the methods and techniques of switch operations; they are less and less like passive facilities. The Team believes this paradigm shift might reduce DCS related failures by 50%. Among its recommendations are the following:

a) Management should create central organizations and establish procedures for the teams assigned to work with DCSs, including development of disaster strategies and training by equipment suppliers. Suppliers should focus on system defensiveness, human factors design and documentation. There should be a working partnership with vendors. All upgrades or growth and maintenance actions should be planned and lab-tested in advance. DCS downtime should be tracked. Instruction manuals should be easy to understand.

b) There should be increased inspection and surveillance of DCS components and sufficient spare parts on hand. There should be redundant disk drives with common data. Optical disks are recommended since they have higher reliability and quicker restoral. There should be redundant controllers where economically feasible. Switches can have redundant synchronized controllers. Service providers should insist that equipment suppliers provide data to prove that simplex or redundant controllers meet their in-service reliability requirements. Systematic inspection of passive connecting hardware during installation and turn-up and periodic tests during in-service but off-peak hours is encouraged. When possible, carriers should provide a second link between the operation system and the controller so that failure of a single link will not cause an outage.

c) There should be a simulated environment in which to test software. Commands in machines that can shut down those machines have to be carefully controlled. Higher level commands should only be given by trained staff. There should be a warning before commands that have wide service-affecting consequences. Machines should have self-protecting mechanisms. DCS reliability improvement should be measured using FCC outage reports.

14. *Fire:* In 1992 no outage was required to be reported to the FCC that was associated with a fire. However, experience has shown that fires can be especially debilitating. The Fire Prevention Focus Team gathered data on the number of switch/transmission locations in the networks, repeater stations, satellite earth stations and controlled environment vaults operated by each carrier as well as that carrier's current capabilities for fire detection, alarm, smoke control, fire department access and fire suppression. They gathered specific information on fire-related incidents from 1988 to 1992, of which there were 189. About 20 percent of the incidents were service-affecting. More than 80 percent of the incidents occurred in central offices, and the primary causes were attributable to power equipment (32 percent), building systems (18 percent) and vendor activity (17 percent). The Team concluded that fire-related incidents could be reduced by 25% if its recommendations, which include the following, were implemented.

a) For power equipment, there should be smoke and heat detection capability. There should be power plant modernization for DC power equipment, adequate ventilation, regular inspection and battery maintenance, separation of DC and AC power cables, verification of DC fusing levels, arc fault detection equipment and replacement of units with a history of component failure. Smaller power plants should be closer to the load, and there should be thermographic inspection of equipment. Utility transformers should be located outside the facility. Motors should be regularly inspected and manufacturers' instructions for breakers should be followed.

b) Vendors should ensure overload protection for power equipment, limiting power when there is a short. There should be wire and connector protection from overcurrent. There should be power output division and redundancy. Plant interfaces should be able to resist over-voltage. There should be adherence to industry standards for power cable replacement and improved resistance to flammability in equipment.

c) To prevent vendor or contractor initiated incidents, there should be defined procedures for equipment removal and other work at the facility. There should be vendor and contractor certification. There should be building inspection for correct placement of electrical appliances, periodic reviews of correct use of soldering irons and no smoking.

d) To limit fires caused by natural events, power cables should not be placed near tree limbs and other obstructions. There should be AC surge protection, verified telecommunications grounding arrangements and regular testing of environmental alarms.

e) To protect buildings, there should be telecommunications building certification for fire safety, avoidance of flammable landscape material and proper air filtration so that outside smoke cannot enter the premises. There should be effective smoke management systems. There should be preplanning for telecommunications facility alarms with local fire agencies. Modern smoke detection systems are essential.

f) Because no fire incidents have been reported under the existing reporting thresholds, the Fire Focus Team recommended that all fire-related incidents that affect service to 100 or more service lines for a period of 30 minutes or longer be reported within twenty four hours to the ATIS for study.

15. *E911:* Outages affecting special facilities resulted from a variety of causes. The Steering Team chose to study outages affecting E911 services because of their critical nature. The E911 Systems Focus Team sent out three different sets of questionnaires and conducted numerous interviews of local exchange providers and administrators of 911 service. The Team surveyed 911 availability and the type of equipment used to provide 911 service and gathered data on service disruptions in 1991 and 1992 that caused significant loss of 911 availability for 30 or more minutes. A total of 123 service disruption reports were received and analyzed. On the basis of its analysis, the Team concluded that over 50% of 911 service outages involved failures in the interoffice facilities transporting the 911 call, most often caused by cable cuts during excavation. The Team recommended route diversity and special handling of 911 serving arrangements to eliminate single points of failure in the interoffice facilities serving Tandem switches and the Automatic Line Identification data base portions of the 911 network. The Team recommended multiple 911 Tandem switch architectures. The Team also recommended that application of SS7 to 911 service be delayed until the unique characteristics and feature requirements of 911 service are addressed in the SS7 protocol by the standards bodies. The Team recommended establishment of disaster recovery plans and of a formal communications process between the local exchange carriers providing 911 service and the public safety agencies administering it. The Team recommended that the National Emergency Number Association (NENA) serve as the forum to improve communications between all stakeholders in 911 service, to perform ongoing macro-analysis of FCC outage reports on behalf of 911 stakeholders and to analyze methods and procedures for cellular and PBX use of 911. FCC outage reports were recommended as a metric for tracking improvement in 911 reliability as a result of the implementation of the Team's other recommendations.

16. Accurate and full reporting of telephone service outages will be crucial to monitoring future network performance. The expert analysis provided by the focus teams has provided the industry and the Commission with a basis for determining whether the recommended best practices are being implemented and the extent to which they are successful in avoiding telephone service outages. We have carefully analyzed the NRC's recommendations regarding the existing reporting rules. Based on this analysis and consistent with the recommendations of the Threshold Reporting Group, the Commission proposes the following: outages potentially affecting 50,000 or more customers and lasting 30 or more minutes must be reported; however, as suggested by the NRC, the reporting deadline would be extended from 90 minutes to 120 minutes of the carrier's first knowledge that a reportable outage is in progress. The NRC informs us that many carriers find it difficult to deal with an outage and to report the outage within the shorter time frame.[16] Our need to receive information rapidly must be balanced against concerns that our requirements not interfere with restoration of service to the public and that the information received be meaningful and accurate. Many reports now filed within 90 minutes simply state "information not available." We expect that providing 30 additional minutes will result in more meaningful responses.

17. Next, the Commission proposes to adopt the NRC's recommendation for modified reporting requirements for outages potentially affecting at least 30,000 but less than 50,000 customers. As stated in the TRG Report, reducing the threshold from 50,000 to 30,000 potential customers could double the number of outage reports annually.[17] Additionally, the TRG Report states, three times the outage information concerning local switches would be received if the lower threshold were adopted. The TRG Report concludes, "[w]e feel this additional information is important to monitor central office reliability as well as for supplemental data it provides on the other elements in this category."[18] We tentatively endorse this conclusion but not the TRG's proposal to require less information in the initial service disruption reports for outages potentially affecting at least 30,000 but less than 50,000 customers. We tentatively endorse the proposal to permit three days for the filing of the initial service disruption report.[19] *See* proposed rule §63.100(c) at Appendix A. We expect that in many cases the three day initial report will provide a complete accounting of the incident. It appears that the TRG's proposal would give us the information we need to accomplish our stated objectives (*see Report and Order* at para. 5), without unduly increasing the overall reporting burden on the carriers.

18. We also propose to incorporate into our rules the current practice of reporting outages affecting special offices and facilities. Such outages could have a major impact on the public even if they do not meet our outage reporting thresholds.[20] Such outages are reported by the carriers serving these offices and facilities regardless of the number of customers affected within 120 minutes of the carrier's

[16] Final Recommendation of the Threshold Reporting Group of the Network Reliability Council, at page 14.

[17] The number of reports for the base year, projecting for a full year from the number of reports received during the part of that base year when reports were being provided, is 199.

[18] TRG Report at p. 13.

[19] In the initial 30,000 to 50,000 reports, we will also require carriers to state the probable root causes of the incident, if identified.

[20] We tentatively adopt the NRC's definition of "special offices and facilities" to mean major airports, major military installations, key government facilities, nuclear power plants and 911

first knowledge that the service outage affects a special facility. However, we are concerned that the reporting of outages at government and other sensitive facilities be accomplished consistently with the nation's National Security and Emergency Preparedness (NS/EP) requirements. We therefore propose the following procedures agreed upon by the Council for reporting outages affecting nuclear power plants, major military installations and key government facilities.

1. When there is a mission-affecting outage,[21] the affected facility will report the outage to the National Communication System (NCS) and call the service provider in order to determine if the outage is expected to last 30 minutes. If the outage is not expected to, and does not, last 30 minutes, it will not be reported to the FCC. If it is expected to last 30 minutes or does last 30 minutes, the NCS, on the advice of the affected special facility, will either:

   a. forward a report of the outage to the Commission, supplying the information for initial reports specified in Section 63.100 of the Commission's Rules,

   b. forward a report of the outage to the Commission, designating the outage as one affecting "special" facilities," but reporting it at a level of detail that precludes identification of the particular facility involved,

   c. hold the report at the NCS due to the critical nature of the application.

2. If there is to be a report to the Commission, a written report will be sent by the NCS within 120 minutes of an outage.

3. The service provider will provide a written report to the NCS, which will then file the report with the FCC within 30 days after the outage. If the outage is reportable as described above, the NCS will forward the report, as provided in either "a" or "b" above, to the Commission.[22]

We ask the NCS to submit comments either endorsing the continuation of these or proposing other procedures to accommodate NS/EP requirements. Comments from other parties are also solicited.

19. We tentatively accept the NRC's recommendation that interexchange carriers (IXCs) be permitted to use blocked calls to determine whether the threshold for reporting an outage has been reached. In the *Report and Order* we rejected AT&T's proposal for a reporting threshold for IXCs of blocked calls greater than 1% of total call attempts in the carrier's network, because we concluded that such a threshold could result in significant service disruptions going unreported.[23] However, we adopted AT&T's and MCI's proposal to use the estimated number of blocked calls to determine the scope and impact of the outage event.[24] The TRG Report shows that the IXCs have been using the number of blocked calls to determine whether the thresholds prescribed by our rules and by the NRC have been met. Relying on research indicating that the number of blocked calls is not a one-to-one representation of customers affected[25] because the average customer redials at least three times in attempting to complete a call during an outage,[26] IXCs are reporting incidents where more than 150,000 calls are blocked during a 30 minute period for purposes of complying with the required 50,000 customers threshold and incidents where more than 90,000 calls are blocked during a 30 minute period for purposes of complying with the presently voluntary 30,000 customers threshold.[27] Since we are proposing to reduce the required threshold to the 30,000 customers level, we feel that this method of using blocked calls to calculate thresholds will not result in significant service disruptions going unreported. Moreover, outages affecting IXCs are of somewhat less urgency because most consumers can access an alternative IXC service provider simply by dialing a 5 digit code. Finally, our experience with voluntary reporting indicates the blocked call approach has been adequate to keep the Commission informed of major events and has provided a basis to identify trends in reliability. As long as the thresholds prescribed by our rules are observed, we can see no objection to the above described use of blocked calls to achieve compliance.[28]

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tandems. "Major airports" would be defined as those airports described by the Federal Aviation Administration as large or medium hubs. In accordance with the recommendation of the National Security/Emergency Preparedness Panel of the President's National Security Telecommunications Advisory Committee, the member agencies of the NCS will determine which locations are "major military installations" and "key government facilities."

[21] A "mission affecting" outage is an outage that is deemed critical to NS/EP operations of the affected facility by the National Communications System member agency operating the affected facility. See "Reporting Outages at Special Facilities,'" an Attachment included with the Final Recommendations of the Threshold Reporting Group in Network Reliability: A Report to the Nation.

[22] Letter of Paul H. Henson, Chairman, Network Reliability Council, to Chairman, Federal Communications Commission, October 19, 1992.

[23] Report and Order at para. 12.

[24] *Id.* at para. 21.

[25] In the *Report and Order*, n.17, we agreed with the comments of John C. McDonald that redials would cause the estimated number of customers affected by an outage to become inflated if the estimate were based on a strict counting of blocked calls. The IXC's adjustment, therefore, seems reasonable.

[26] Report of the Threshold Reporting Group of the Network Reliability Council, (April 20, 1992) p. 8.

[27] Final Recommendation of The Threshold Reporting Group of the Network Reliability Council.

[28] In the case of a local exchange carrier tandem loss, we believe that the number of potentially affected customers should be determined by the actual number of lines connected to switches directly homing on the tandem, regardless of the traffic usually passed through that tandem at any hour of the day. At one point, the TRG had suggested that the number of customers potentially affected by a LEC tandem outage would be equal to the traffic normally travelling over the affected lines at the time of the day during which the outage occurred. Such a method would be more indirect and less reliable than the method used by the IXCs, where the number of customers determined to have been potentially affected depends on the number of actual calls blocked during the outage. We note also that normal traffic

20. With respect to confidentiality, we will continue to follow the procedures set forth in Section 0.459 of our Rules. As noted in the *Report and Order* at para. 31, we do not anticipate, as a general matter, that there will be a basis for providing confidentiality.

21. We have discerned no attempts by the carriers to violate or circumvent our outage reporting rules. Our *Report and Order* encouraged all carriers to notify the Commission when they became aware of a reportable outage, even if they were not owners or operators of the affected facilities. While several reports have been submitted late, and while there occasionally has been confusion regarding which carrier should report incidents affecting shared facilities, we have not been made aware of incidents of non-compliance. Thus, we tentatively agree at this time with the NRC that the reporting thresholds themselves should not be used as an absolute standard for levying fines or forfeitures. We also seek comments on this tentative conclusion. The gathering and sharing of information useful to ensure continued network reliability remains our primary concern. However, if we find that a carrier willfully or repeatedly seeks to mislead the Commission or the public by underreporting or by not reporting outages in violation of our rules, we will take appropriate enforcement action. In this connection, we note the TRG's statement that it formulated its recommendations for the purpose of providing the Commission with all necessary information on the state of network reliability, and not for the purpose of establishing enforceable minimum levels of carrier performance. While we do not establish such performance levels at this time, we reserve the right to take any action within our authority necessary to ensure efficient telecommunications service. Additional rulemaking activity is likely if it appears carriers are not observing best practices.

22. As mentioned, the Focus Area Teams and the Steering Team recommend that outage reports currently being filed with the FCC be used to track improvements in network reliability that result from implementation of the Teams' and Council's recommendations. We propose several modifications to the reporting requirements not specifically considered by the TRG. First, the Fire Prevention Team suggests the additional reporting of fire-related events outlined above also be used for tracking. Given the impact that a fire can have on network reliability and the lack of recent data on fire-related events, the Commission proposes to add this Fire Team recommendation to our rules, with a final 30 day report as well as an initial 3 day report being sent to the Commission.[29] The Team believes no more than thirty additional reports will be filed each year as a result of this requirement. Second, in addition to asking for the cause of the incident insofar as it can be determined in the initial report, we ask that, in the final report, the root cause be determined and stated, consistent with the analysis used by the focus teams. Third, we will require that final reports include a discussion of best practices or industry standards identified by the Network Reliability Council that relate to the incident. This data will enable us to evaluate the effectiveness of, and the carriers' success in, implementing the NRC's work.

## IV. PETITIONS FOR RECONSIDERATION

23. In its petition for reconsideration, TCA reiterates its proposal that carriers be required to report within 90 minutes outages affecting 5000 lines for more than 20 minutes, and within 24 hours outages affecting 1000 lines for more than 10 minutes, as well as any outages affecting facilities used in providing emergency services.[30] TCA notes that the Commission has referred these matters to the NRC and urges the Commission to adopt TCA's proposals if the NRC does not recommend "similarly effective requirements."[31] In their oppositions, AT&T and MCI point out that TCA's proposal was considered and rejected in the *Report and Order* and that TCA has presented no new arguments in support of its petition. Furthermore, they state, the Commission has enlisted the assistance of the NRC to investigate the suitability of the reporting criteria and that the NRC should be permitted to present its recommendations to the Commission before further rule changes are adopted. In its reply, TCA reiterates the contentions stated in its petition for reconsideration, but points out that it has p presented its own proposals to the NRC and states that if the lower reporting threshold it proposes is ultimately adopted, and if the Commission takes favorable action on its other recommendations, it will consider its petition moot.

24. TCA's petition for reconsideration is denied. TCA has presented no new grounds to persuade us to adopt its threshold reporting proposals as part of our emergency outage reporting procedures. However, we have considered its proposals anew, as has the NRC, and we have tentatively adopted at least one of TCA's proposals relating to reporting thresholds for special offices and facilities.[32] Since TCA's comments were filed, the Council's Mutual Aid and Restoration Compendium Team has filed its final report, which is a compendium of existing mutual aid agreements, both formal and informal, with suggestions for their im-

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for the time of day is not a stable determinant of events such as local disturbances or media broadcasts which might cause larger than normal traffic volume. Finally, the number of lines served by a LEC tandem switch is much more easily determined than the number of customers who potentially could be served by a large switch in an IXC network. We ask for comment on this matter.

[29] We see no need to establish a unique 24 hour initial report period for fire-related outages. An unnecessary multiplicity of reporting periods will only add confusion to the outage reporting process.

[30] In a letter dated April 15, 1992 to the NRC, TCA proposed that outages affecting more than 20,000 lines for more than 30 minutes be reported to the Commission within 90 minutes, and that outages affecting facilities used to provide emergency and public safety services be reported in 90 minutes regardless of the number of lines affected.

[31] Additionally, TCA reiterates that the Commission should direct carriers to work together when outages occur and to educate users in order to minimize the scope of disruptions, and that the Commission should require, "any carrier with an inferior reliability record to conduct and file a self-audit addressing the reasons for its poor performance and the steps it is taking to improve."

[32] *See* Minutes of April 29, 1992 meeting of the NRC at para. 26. Minutes of all NRC meetings are available in room 6325 of the Commission's offices at 2025 M Street N.W., Washington, D.C. 20554, or through the Commission's duplicating contractor, ITS, Inc., at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800.

plementation and lists of carrier contacts for facilitating cooperation. Thus, it appears that TCA's concerns have been addressed. In these circumstances, we believe the proper course is to present the NRC's broad-based proposals for comment in this *Notice*. All parties have the opportunity to file further comments in this proceeding and to state whether they support the NRC's proposals or other alternatives.

25. In its petition, USTA seeks reconsideration of the *Report and Order* to the extent it exempts competitive access providers from the reporting requirement. USTA states that this exemption is inconsistent with the Commission's procompetitive policies and with such Commission purposes in requiring notification as assuring the reliability of technology and equipment used by all carriers including competitive access providers. MFS states that it agrees with USTA that it would be "asymmetric" to exclude competitive access providers (like MFS) from the reporting requirement, but that it is similarly asymmetric for USTA to suggest that interconnection of competitive access providers with the public switched network can place other networks at risk. BellSouth, Pacific, and Centel support USTA's request that competitive access providers be included in the reporting requirement. BellSouth points out that the term "competitive access provider" is not clearly defined and that in a competitive marketplace, all access providers are in fact "competitive access providers." Furthermore, BellSouth and Centel state, there is no doubt that service disruptions on a competitive access provider's network can cause significant service disruptions and, as such, should certainly be included in the Commission's database and investigations. Finally, BellSouth points out that in a competitive marketplace there is no justification for imposing lesser regulatory burdens on one class of competitors. Southwestern states that it does not oppose USTA's petition but points out that competitive access providers generally set up localized networks of select customers in a specific geographical area which rarely, if ever, results in 50,000 or even 30,000 customers being located on one particular network. Moreover, Southwestern urges the Commission to ignore MFS's "self-serving" argument concerning interconnection with the public switched network which, it states, is unrelated to the content of this proceeding. In its reply, USTA points out that the NRC has expressed particular interest in outages occurring at certain "special" facilities. In these circumstances, USTA argues, it is anomalous to exclude from the reporting requirement competitive access providers that may be serving these special areas.

26. USTA's reconsideration petition is granted. As we stated in the *Report and Order*, at paras. 4 and 5, one of our primary purposes in instituting the subject reporting requirements is to become informed quickly of major service disruptions. We excluded competitive access providers because alternative methods of communication are generally available to the users of those services and, therefore, it is unlikely that outages on their facilities will result in major service disruptions. *Id.* at para. 25. As is argued by several commenters, however, outages at special offices and facilities could have major public impact regardless of the number of customers affected. Because we are proposing to include special facilities in our reporting requirements, we believe it is most consistent with that proposal to include competitive access providers in our reporting rules. In addition, the number of lines served by competitive access providers is likely to grow in the future, increasing the possibility a competitive access provider would reach the 30,000 customer threshold. We therefore eliminate the exception for reporting provided to competitive access providers in our current rules.

## V. CONCLUSION

27. The efforts of the Network Reliability Council constitute an important and timely contribution to telephone service reliability in the United States. We urge all carriers and equipment suppliers to review each of the Focus Team reports. While most of the recommendations are directed to carrier, equipment supplier or collective industry action, we seek comment on whether there are effective and efficient steps the Commission can and should take to ensure additional network reliability. In addition, we seek comment on the proposals for outage reporting outlined above, including the requirements:

a) that carriers report to the Commission within 120 minutes outages lasting 30 minutes or more and potentially affecting 50,000 or more customers, with a final report to be filed within 30 days;

b) that carriers report to the Commission within 120 minutes of outages of special offices and facilities[33] failures lasting 30 minutes or more regardless of the number of customers affected, using the alternative procedures for reporting failures with NS/EP implications as described herein;

c) that carriers notify the Commission within 3 days of any outage lasting 30 minutes or more and potentially affecting between 30,000 and 50,000 customers, and that carriers submit a final report of the outage to the Commission within 30 days;

d) that carriers notify the Commission within three days of any fire-related incident impacting 100 or more lines for thirty or more minutes, and that carriers submit a final report of the incident to the Commission within 30 days;

e) that interexchange carriers be permitted to use blocked calls to determine whether criteria for reporting an outage have been reached;

f) that carriers' final reports include a root cause analysis and an analysis of relevant best practices.

28. This is a nonrestricted notice and comment rulemaking proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203 and 1.1206(a).

29. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined in section 601(3) of the Regulatory Flexibility Act. The Secretary shall send a copy of this Further Notice of Proposed

[33] See note 7 and 20.

Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with section 605 of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1980).

30. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **January 21, 1994** and reply comments on or before **February 22, 1994.** To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting documents. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 230, 1919 M Street, N.W., Washington, DC.

## VI. ORDERING CLAUSES

31. Accordingly, pursuant to sections 1, 4, 201-205, 218, 220 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 218, 220 and 403, IT IS ORDERED that CC Docket No. 91-273 is reopened, and FURTHER NOTICE OF PROPOSED RULEMAKING is hereby provided to amend Section 63.100 to the Commission's rules, 47 C.F.R. § 63.100, as indicated above and in Appendix A hereof.

32. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 5(c) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 155 and 405, the petition for reconsideration filed in this proceeding by Tele-Communications Association IS DENIED.

33. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 5(c) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 155 and 405, the petition for reconsideration by United States Telephone Association IS GRANTED to the extent of incorporating the changes specified in Appendix B hereof, effective 90 days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## APPENDIX A

Part 63 of the Commission's Rules and Regulations (chapter 1 of title 47 of the Code of Federal regulations, Part 63) is proposed to be amended as follows:

1. The authority citation for part 63 remains as follows:

**AUTHORITY: Sections 1, 4(i), 4(j), 201-205, 218 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. secs. 151, 154(i), 154(j), 201-205, 218, and 403, unless otherwise noted.**

2. §63.100 is proposed to be amended by deleting the present §63.100 in its entirety and substituting the following:

* * * * *

**§ 63.100 NOTIFICATION OF SERVICE OUTAGE**

(a) As used in this section:

(1) "outage" is defined as a significant degradation in the ability of a customer to establish and maintain a channel of communications as a result of failure in a carrier's network.

(2) "customer" is defined as a user purchasing telecommunications service from a common carrier.

(3) "special offices and facilities" are defined as major airports, major military installations, key government facilities, nuclear power plants and 911 tandems.

(4) "major airports" are defined as those airports described by the Federal Aviation Administration as large or medium hubs. The member agencies of the National Communications System (NCS) will determine which of their locations are "major military installations" and "key government facilities."

(5) An outage which "potentially affects" a major airport is defined as an outage that disrupts air traffic control links or other critical FAA communications links for any major airport.

(6) A "mission-affecting" outage is defined as an outage that is deemed critical to NS/EP operations of the affected facility by the National Communications System member agency operating the affected facility.

(b) Any local exchange or interexchange common carrier that operates transmission or switching facilities and provides access service or interstate or international telecommunications service, that experiences an outage which potentially affects 50,000 or more of its customers on any facilities which it owns, operates or leases, must notify the Commission if such outage continues for 30 or more minutes. Satellite carriers and cellular carriers are exempt from this reporting requirement. Notification must be served on the Commission's Monitoring Watch Officer, on duty 24 hours a day in the FCC headquarters building in Washington, D.C., or on a secondary basis it may be served on the Commission's Watch Officer on duty at the FCC's facility at Grand Island, Nebraska. The notification must be by facsimile or other record means delivered within 120 minutes of the carrier's first knowledge that the service outage potentially affects 50,000 or more customers, if the outage continues for 30 or more minutes. Notification shall identify a contact person who can provide further information, the telephone number at which the contact person can be reached, and what information is known at the time about the service outage including: the date and estimated time (local time at the location of the outage) of commencement of the outage; the geographic area affected; the estimated number of customers affected; the types of services affected (*e.g.* interexchange, local, cellular); the duration of the outage, *i.e.* time elapsed from the estimated commencement of the outage until restoration of full service; the estimated number of blocked calls during the outage; the apparent or known cause of the incident, including the

name and type of equipment involved and the specific part of the network affected; methods used to restore service; and the steps taken to prevent recurrences of the outage. The report shall be captioned Initial Service Disruption Report. Lack of any of the above information shall not delay the filing of this report. Not later than thirty days after the outage, the carrier shall file with the Chief, Common Carrier Bureau, a Final Service Disruption Report providing all available information on the service outage, including any information not contained in its Initial Service Disruption Report and detailing specifically the root cause of the outage and listing and evaluating the effectiveness and application in the immediate case of any best practices or industry standards identified by the Network Reliability Council to eliminate or ameliorate outages of the reported type.

(c) Any local exchange or interexchange common carrier that operates transmission or switching facilities and provides access service or interstate or international telecommunications service, that experiences an outage which potentially affects at least 30,000 and less than 50,000 of its customers on any facilities which it owns, operates or leases, must notify the Commission if such outage continues for 30 or more minutes. Satellite carriers and cellular carriers are exempt from this reporting requirement. Notification must be served on the Commission's Monitoring Watch Officer, on duty 24 hours a day in the FCC headquarters building in Washington, D.C., or on a secondary basis it may be served on the Commission's Watch Officer on duty at the FCC's facility at Grand Island, Nebraska. The notification must be by facsimile or other record means delivered within 3 days of the carrier's first knowledge that the service outage potentially affects at least 30,000 but less than 50,000 customers, if the outage continues for 30 or more minutes. Notification shall identify the carrier and a contact person who can provide further information, the telephone number at which the contact person can be reached, and what information is known at the time about the service outage including: the date and estimated time (local time at the location of the outage) of commencement of the outage; the geographic area affected; the estimated number of customers affected; the types of services affected (*e.g.* interexchange, local, cellular); the duration of the outage, *i.e.* time elapsed from the estimated commencement of the outage until restoration of full service; the estimated number of blocked calls during the outage; the apparent or known cause of the incident, including the name and type of equipment involved and the specific part of the network affected; methods used to restore service; and the steps taken to prevent recurrences of the outage. The report shall be captioned Initial Service Disruption Report. Lack of any of the above information shall not delay the filing of this report. Not later than thirty days after the outage, the carrier shall file with the Chief, Common Carrier Bureau, a Final Service Disruption Report providing all available information on the service outage, including any information not contained in its Initial Service Disruption Report and detailing specifically the root cause of the outage and listing and evaluating the effectiveness and application in the immediate case of any best practices or industry standards identified by the Network Reliability Council to eliminate or ameliorate outages of the reported type.

(d) Any local exchange or interexchange carrier that operates transmission or switching facilities and provides access service or interstate or international telecommunications service that experiences a fire-related incident in any facilities which it owns, operates or leases that impacts 100 or more service lines must notify the Commission if the incident continues for a period of 30 minutes or longer. Satellite carriers and cellular carriers are exempt from this reporting requirement. Notification must be served on the Commission's Monitoring Watch Officer, on duty 24 hours a day in the FCC headquarters building in Washington, D.C., or on a secondary basis it may be served on the Commission's Watch Officer on duty at the FCC's facility at Grand Island, Nebraska. The notification must be by facsimile or other recorded means delivered within 3 days of the carrier's first knowledge that the incident is fire-related, impacting 100 or more lines for thirty or more minutes. Notification shall identify the carrier and a contact person who can provide further information, the telephone number at which the contact person can be reached, and what information is known at the time about the service outage including: the date and estimated time (local time at the location of the outage) of commencement of the outage; the geographic area affected; the estimated number of customers affected; the types of services affected (*e.g.* interexchange, local, cellular); the duration of the outage, *i.e.* time elapsed from the estimated commencement of the outage until restoration of full service; the estimated number of blocked calls during the outage; the apparent or known cause of the incident, including the name and type of equipment involved and the specific part of the network affected; methods used to restore service; and the steps taken to prevent recurrences of the outage. The report shall be captioned Initial Service Disruption Report. Lack of any of the above information shall not delay the filing of this report. Not later than thirty days after the incident, the carrier shall file with the Chief, Common Carrier Bureau, a Final Report providing all available information on the incident, including any information not contained in its Initial Report and detailing specifically the root cause of the incident and listing and evaluating the effectiveness and application in the immediate case of any best practices or industry standards identified by the Network Reliability Council to eliminate or ameliorate incidents of the reported type.

(e) Any local exchange or interexchange common carrier that operates transmission or switching facilities and provides access service or interstate or international telecommunications service, that experiences an outage on any facilities which it owns, operates or leases which potentially affects special offices and facilities must notify the Commission if such outage continues for 30 or more minutes regardless of the number of customers affected. Satellite carriers and cellular carriers are exempt from this reporting requirement. Notification must be served on the Commission's Monitoring Watch Officer, on duty 24 hours a day in the FCC headquarters building in Washington, D.C., or on a secondary basis it may be served on the Commission's Watch Officer on duty at the FCC's facility at Grand Island, Nebraska. The notification must be by facsimile or other record means delivered within 120 minutes of the carrier's first knowledge that the service outage potentially affects a special facility, if the outage continues for 30 or more minutes. Notification shall identify a contact person who can provide further information, the telephone number at which the contact person can be reached, and what information is known at the time about the service outage including: the date and estimated time (local time at the location of the outage) of commencement of the outage; the geographic area affected; the estimated number of cus-

tomers affected; the types of services affected (*e.g.* 911 emergency services, major airports); the duration of the outage, *i.e.* time elapsed from the estimated commencement of the outage until restoration of full service; the estimated number of blocked calls during the outage; the apparent or known cause of the incident, including the name and type of equipment involved and the specific part of the network affected; methods used to restore service; and the steps taken to prevent recurrences of the outage. The report shall be captioned Initial Service Disruption Report. Lack of any of the above information shall not delay the filing of this report. Not later than thirty days after the outage, the carrier shall file with the Chief, Common Carrier Bureau, a Final Service Disruption Report providing all available information on the service outage, including any information not contained in its Initial Service Disruption Report and detailing specifically the root cause of the outage and listing and evaluating the effectiveness and application in the immediate case of any best practices or industry standards identified by the Network Reliability Council to eliminate or ameliorate outages of the reported type. Under this rule, carriers are not required to report outages affecting nuclear power plants, major military installations and key government facilities to the Commission. Reports at these facilities will be made according to the following procedures:

(1) When there is a mission-affecting outage, the affected facility will report the outage to the National Communications System (NCS) and call the service provider in order to determine if the outage is expected to last 30 minutes. If the outage is not expected to, and does not, last 30 minutes, it will not be reported to the FCC. If it is expected to last 30 minutes or does last 30 minutes, the NCS, on the advice of the affected special facility, will either:

(A) forward a report of the outage to the Commission, supplying the information for initial reports affecting special facilities specified in this section of the Commission's Rules;

(B) forward a report of the outage to the Commission, designating the outage as one affecting "special" facilities," but reporting it at a level of detail that precludes identification of the particular facility involved; or

(C) hold the report at the NCS due to the critical nature of the application.

(2) If there is to be a report to the Commission, a written report will be sent by the NCS within 120 minutes of an outage to the Commission's Monitoring Watch Officer, on duty 24 hours a day in the FCC headquarters building in Washington, D.C., or on a secondary basis it may be served on the Commission's Watch Officer on duty at the FCC's facility at Grand Island, Nebraska.

(3) If there is to be a report to the Commission, the service provider will provide a written report to the NCS, supplying the information for final reports for special facilities required by this section of the Commission's rules. The service provider's final report to the NCS will be filed in a timely manner, allowing the NCS to then file the report with the Commission within 30 days after the outage. If the outage is reportable as described above, the NCS will forward the report as provided in either (e)(1)(A) or (e)(1)(B) of this section to the Commission.

(f) Interexchange carriers may use blocked calls to determine whether criteria for reporting an outage have been reached. IXCs must report incidents where more than 150,000 calls are blocked during a 30 minute period for purposes of complying with the required 50,000 potentially affected customers threshold and must report incidents where more than 90,000 calls are blocked during a 30 minute period for purposes of complying with the 30,000 potentially affected customers threshold.

## APPENDIX B

Part 63 of the Commission's Rules and Regulations (chapter 1 of title 47 of the Code of Federal regulations, Part 63) is amended as follows:

1. The authority citation for part 63 remains as follows:

**AUTHORITY: Sections 1, 4(i), 4(j), 201-205, 218 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. secs. 151, 154(i), 154(j), 201-205, 218, and 403, unless otherwise noted.**

2. §63.100 is amended by replacing the second sentence in §63.100 (a) with the following sentence:

Satellite carriers and cellular carriers are exempt from this reporting requirement.

SEPARATE STATEMENT
OF
CHAIRMAN JAMES H. QUELLO

My primary purpose in issuing this statement is to again thank Paul Henson and all the members of the Network Reliability Council, on behalf of the Commission, for their efforts in compiling "Network Reliability: A Report to the Nation", a compendium of the studies commissioned by the Council. This 1,000 page document is a credit to the hundreds of participants who assisted in its preparation, particularly Ross Ireland of the steering team who managed the effort. I also thank the National Engineering Consortium and the Alliance for Telecommunications Industry Solutions for their efforts, both past and continuing, in helping the Council share its findings within the industry.

When the Council delivered its recommendations to the Commission and to the industry several months ago, I stated that "it now becomes the responsibility of the many companies who make up the telecommunciations industry to learn from the work of the Council and to implement the Council's recommendations." This Order highlights some of the findings and best practices recommended by the Council to mitigate and avoid telephone service outages. While I expect that service and equipment providers will become familiar with, and heed, the recommendations in the Council's report, even that document cannot be definitive, given the variety and complexity of today's networks. In many respects it serves as a source book to other references. The report on signalling, for example, refers to more than 100 other sources; the report on switching to nearly as many.

Telecommunications is a complex and dynamic industry. Since we chartered the Council in January of 1992, indeed, even in the few short months since the Council delivered its report, fundamental changes have occurred or been proposed. For example, we have launched a new industry -- Personal Communications Services -- that will offer consumers new options and new services by which to satisfy their increasingly mobile communications needs. It appears these services will interconnect with the traditional carriers.

Additionally, local exchange carriers have filed for, and been granted, authorizations to provide video dialtone services. The proposals have presented different architectures, but all the services proposed so far are provided out of local offices. Several carriers have announced or consummated major acquisitions and mergers intended to bring them into new areas of telecommunciations. While it is unclear how several of these matters ultimately will be resolved, it is evident that change in telecommunications is increasingly the rule.

The Council's report does not address the implications of these developments for network reliability directly. In preparing their

studies, the different focus teams of the Council used the quality process, which analyzes historical data and develops strategies to solve known problems. We have no data on telephone service outages associated with future PCS or video services.

The Council's report anticipates new developments, however, in that it focuses considerable attention on what has proven to be, the single largest root cause of outages, whether the outage occurs in signalling systems, or switching systems or digital cross connect systems. That cause is variously described in the reports as human -- or procedural -- error. It is the same root cause we found in four major telephone service disruptions in 1990 and 1991, each of which resulted in millions of blocked calls. The Council's focus teams consistently found that in roughly 40 to 60 percent of all outage situations procedures were inadequate, or a human being made a mistake in following the procedures.

The focus teams offer no precise, simple, or easily administered solution to the problem of human error, but they do point the way. Methods of procedure must be clear, accurate, and tested before being used. Effective training programs must be established and supported. Software, hardware and systems need to anticipate human error, be tested thoroughly, and be designed defensively. Performance review needs to be continuous. Critical systems need to be redundant. High risk activity should be done in low traffic periods. Alarm systems need to be well-conceived and tested.

In short, the recommendations of the Council, if implemented, should avoid not only the historic causes of outages but also the likely causes of outages in the future as the telecommunications industry absorbs new technologies and new participants to bring new capabilities and new options for consumers. The need to minimize human error is at the heart of the reliability issue and is unlikely to change in the future, regardless of technology.

Although most mistakes are avoidable, few are intentional. Nevertheless, it is the companies we must hold accountable for network reliability because it is they who incur the costs of training, testing, redundancy, off schedule maintenance and the other solutions recommended by the Council that will improve reliability. The nation's expectations of the telecommunications industry are high and the Network Reliability Council has raised them. While the Council has found, on average, that switching systems operate as intended more than 99.99% of the time, .01% downtime translates into millions of minutes of outage annually. The switching team has identified dozens of ways to improve this already good performance.

That improvements can and will be made should not obscure the fact that we do have reliable telecommunications networks in this country. I began by thanking the chief executive officers of the telecommunications industry for their support of the Network Reliability Council. I close by thanking the tens of thousands of technicians, engineers, specialists and others who provide us

with reliable telephone networks every day. Regrettably, they seem to command our attention only when something goes wrong. They deserve as much support as we, and the telecommunications industry, can give them.

**SEPARATE STATEMENT**

**OF**

**COMMISSIONER ANDREW C. BARRETT**

**RE: Amendment of Part 63 of the Commission's Rules to Provide for Notification by Common Carriers of Service Disruptions [ CC Docket No. 91-273]**

Network reliability is of serious concern to anyone interested in the performance of the U.S. telecommunications system. We have excellent telephone service in the U.S. generally, but network outages can and do cause disruption to business and government, and hold the potential for serious threat to public health and safety. When outages occur, they highlight for us the need to continually monitor and improve where necessary the reliability of telecommunications in the U.S.

Two fundamental principles guide my deliberations on network reliability issues. The first is that we must ensure that customer needs for reliable telephone service are met. The second is that in doing so, we must not overregulate or micromanage. Regulators must allow the industry sufficient flexibility to address network reliability matters efficiently and responsibly. In general, this means we must set an appropriate framework and present industry with proper incentives to achieve desired levels of reliability.

Information on network outages is a key prerequisite to meeting network reliability objectives. In 1992, the Commission set out reporting requirements for common carriers that experience network outages. The Commission also asked for the Network Reliability Council's (NRC) recommendations on two important questions: Whether the outage reporting threshold should be lower than 50,000 customers, and whether a separate threshold for reporting outages affecting 911 services or major airports should be adopted.

In part on the basis of the NRC's recommendations, this item proposes to adopt reporting requirements for outages potentially affecting at least 30,000 but less than 50,000 customers. It also proposes to incorporate into the Commission's rules reporting requirements for outages affecting special offices and facilities regardless of the number of customers affected. These are important proposals. I continue to believe that lower reporting thresholds may better capture emergency outage incidents without overburdening the Commission or the industry.

This item contains a further determination that I view as being particularly significant in the longer run. On reconsideration, the Order applies outage reporting requirements to

competitive access providers, which have heretofore been excluded from these requirements. There are now compelling reasons to apply the requirements to CAPs. As the Order notes, outages at special offices and facilities could have major public impact regardless of the number of customers affected. Thus reporting of such incidents could be incomplete without inclusion of the CAPs. Moreover, the rapid growth in the CAP industry means the proposed thirty thousand customer threshold is more likely to be met.

Beyond these considerations, however, the CAP industry is poised for a fundamental transformation in its size and composition, in part as a result of the spate of recent mergers and acquisitions in the industry. This is best illustrated by the U.S. West/Time Warner merger and the proposed Bell Atlantic/TCI merger. These combined companies intend ultimately to become second local wireline companies in areas outside their home regions. While it may take some time to become full blown providers of alternative telephone service including dialtone, their broad scale entry into the competitive access business can be expected to occur much sooner. Simply put, RBOCs and other LECs will be CAPs on a large scale. They will emulate the CAPs in building competitive fiber rings in downtown areas. We can expect them to then move to suburban areas, serving smaller businesses in retail and commercial areas often by extending and upgrading existing cable television plant.

In sum, we are witnessing watershed events in the growth and significance of the CAP industry. To omit this category of service providers from the outage reporting requirements would, in my view, unneccessarily and unacceptably compromise the ultimate purposes of the reporting requirements. This might impede the effective sharing within the industry of information on the causes and effects of network outages, as well as hamper the accumulation of a complete and accurate database on these incidents. Accurate and complete information is necessary to enable the Commission to effectively evaluate network outage experiences, discern trends, and determine any appropriate regulatory steps that may need to be taken.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PP Docket No. 93-253**

In the Matter of

Implementation of Section 309(j)
of the Communications Act
Competitive Bidding

**ORDER**

**Adopted: November 22, 1993; Released: November 23, 1993**

By the Chief, Office of Plans and Policy:

1. On September 23, 1993, the Commission adopted a *Notice of Proposed Rule Making* in the above captioned matter. The filing deadline for comments in PP Docket 93-253 was November 10, 1993, and the reply comments are due November 24, 1993.

2. On November 22, 1993, PMN, Inc., and Southwestern Bell Corporation, filed motions requesting an extension of time in which to file reply comments pursuant to Sections 1.46(b) and 1.415(e) of the Commission's Rules, 47 C.F.R. §§ 1.46(b) and 1.415(e). In support of their requests, PMN and Southwestern Bell state that approximately 200 parties, including themselves, filed comments in the competitive bidding proceeding by the November 10, 1993 deadline. Southwestern Bell and PMN argue that the magnitude of the comments has made the task of preparing reply comments very time-consuming. Further, Southwestern Bell in particular notes that the usual pleading cycles allow a full month for reply comments. They conclude that additional time is necessary to formulate full, accurate and meaningful responses to the myriad arguments contained in the comments. Therefore, Southwestern Bell and PMN request an extension of the reply comment filing deadline in the competitive bidding proceeding.

3. While we do not ordinarily grant extensions of time for comments and reply comments in rule making proceedings, in this case we concur with the requests of Southwestern Bell and PMN due to the extraordinary number of comments filed in the competitive bidding proceeding. In addition, we agree that many of the comments include lengthy discussions of auction theory, design and a variety of complex legal issues. Accordingly, we find that providing parties to the competitive bidding proceeding with additional time to formulate responses to the comments would serve the public interest, and that good cause exists to grant the PMN and Southwestern Bell requests. By extending the reply comment filing deadline to Tuesday, November 30, 1993, we afford Southwestern Bell, PMN and other interested parties a fuller opportunity for such participation.[1]

4. On November 12, 1993, after the November 10, 1993 comment deadline, the Law Offices of William E. Zimsky (Zimsky) filed a "Motion for Leave to File Comments One Day Late." In support of his motion, Zimsky argues that no party will be prejudiced by granting his request. We disagree. Because final rules for competitive bidding proceeding are statutorily required to be in place by March 8, 1994, the Commission had to establish a firm comment filing deadline of November 10, 1993. Nearly 200 entities undertook an enormous effort to successfully file comments in a timely manner. Formally accepting late filed comments would, among other things, not serve the policy of encouraging commenters to file in a timely manner. We also note that Zimsky, unlike the Southwestern Bell and PMN in the reply comment context, did not file his request until after the applicable deadline lapsed. Accordingly, we will not formally consider the late-filed comments of Zimsky and other similarly situated entities, but rather will treat them as permissible *ex parte* pleadings.

5. Accordingly, IT IS ORDERED, pursuant to the authority set forth in Sections 0.271 and 1.46 of the Commission's Rules, 47 C.F.R. §§ 0.271 and 1.46, that Southwestern Bell Corporation's and PMN, Inc.'s motions for an extension of time ARE GRANTED to the extent indicated herein, and William Zimsky's motion for acceptance of late-filed comments IS DENIED to the extent indicated herein. The filing deadline for reply comments is extended to November 30, 1993.

FEDERAL COMMUNICATIONS COMMISSION

Robert M. Pepper
Chief, Office of Plans and Policy

[1] In light of this analysis, we waive on our own motion the applicable deadline for filing motions for extensions of time. 47 C.F.R. § 1.46(b).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Complaint of Central Missouri State University against Douglas Cable Communications — CSR-3956-M

Request for Carriage

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 9, 1993; Released: December 9, 1993**

By the Chief, Mass Media Bureau:

1. On July 8, 1993, Central Missouri State University ("CMSU"), licensee of KMOS-TV, Sedalia, Missouri, filed a complaint against Douglas Cable Communications ("Douglas Cable"), pursuant to §615 of the Communications Act, 47 U.S.C. §535. CMSU requests that the Commission order Douglas Cable to carry KMOS-TV on Douglas Cable's cable system serving Montrose, Missouri, and that KMOS-TV be carried on Channel 6.

2. Section 615 of the Communications Act of 1934, as amended, requires a cable system to carry the signals of qualified local noncommercial educational television stations. *See* 47 U.S.C. §535. A television station that is licensed by the Commission as a noncommercial educational television station and is owned and operated by a public agency, nonprofit foundation, corporation or association that is eligible to receive a community service grant from the Corporation for Public Broadcasting will be considered a qualified noncommercial educational television station. *See* 47 U.S.C. §535(l)(1)(A); 47 C.F.R. §76.55(a)(1). A qualified noncommercial educational television station whose Grade B service contour encompasses the principal headend of the cable system will be considered local. *See* 47 U.S.C. §535(l)(2)(A); 47 C.F.R. §76.55(b)(2).

3. CMSU contends that KMOS-TV is a qualified local noncommercial educational television station and therefore it has the right to carriage on Douglas Cable's Montrose, Missouri, cable system. We agree. CMSU has presented the following evidence with respect to KMOS-TV: KMOS-TV is licensed as a noncommercial television station; it is owned by the Board of Regents at Central Missouri State University, a public agency operating under the laws of the state of Missouri; it is eligible to receive a community service grant from the Corporation for Public Broadcasting, and; its Grade B service contour encompasses the principal headend of Douglas Cable's Montrose cable system. Accordingly, KMOS-TV meets the Commission's definition of a qualified local noncommercial educational television station. CMSU has submitted a November 25, 1992 letter which it sent to Douglas Cable requesting carriage on Channel 6. According to CMSU, Douglas Cable has neither commenced carriage nor responded in any way to CMSU's request for carriage and channel positioning.

4. According to § 615(g)(5), a qualified local noncommercial educational station carried pursuant to must-carry requirements must appear on the cable system channel number on which it is broadcast over-the-air, or on the channel on which it was carried on July 19, 1985, at the election of the station, or on such other channel as is mutually agreed upon by the station and the cable operator. 47 U.S.C. §535(g)(5); 47 C.F.R. §76.57(b). Because CMSU has elected that KMOS-TV be carried on its over-the-air channel, Channel 6, we will grant its request that the Commission order Douglas Cable to carry KMOS-TV on Channel 6.

5. In view of the above, the complaint filed on July 8, 1993 by Central Missouri State University, licensee of KMOS-TV, Sedalia, Missouri (CSR-3956-M) IS GRANTED, in accordance with §615(j)(3) of the Communications Act of 1934, as amended, (47 U.S.C. §535). Furthermore, Douglas Cable Communications IS ORDERED to commence carriage of KMOS-TV on Channel 6 within Order on its system serving Montrose, Missouri. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's rules, 47 C.F.R. §0.283.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Complaint of W53AO-TV against Crown Cable — CSR-3990-M

Request for Carriage

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 9, 1993; Released: December 9, 1993**

By the Chief, Mass Media Bureau:

1. On July 19, 1993, Ralph Gene Norman, owner and licensee of W53AO-TV, Lenoir, North Carolina, filed a complaint pursuant to 47 C.F.R. §76.56(b)(3) requesting carriage in Lenoir on Crown Cable's cable system serving Lenoir.

2. Pursuant to §614(a) of the Communications Act of 1934, as amended, a cable system's signal carriage obligation includes carriage of "qualified" low power television (LPTV) stations in certain limited circumstances. *See* 47 U.S.C. §534(a); 47 C.F.R. §76.56(b)(2). A LPTV station that conforms to the rules established for LPTV stations in part 74 of the Commission's rules will be considered "qualified" only if (1) it broadcasts for at least the minimum number of hours of operation required under 47 C.F.R. Part 74; (2) it adheres to Commission requirements regarding nonentertainment programming and employment practices;[1] (3) it complies with interference regulations consistent with its secondary status pursuant to 47 C.F.R. Part 74; (4) it is located no more than 35 miles from the cable system's headend and delivers to the principal headend an over-the-air signal of good quality; (5) the community of license of the station and the franchise area of the cable system are both located outside of the largest 160 Metropolitan Statistical Areas (MSA's) on June 30, 1990, and the population of such community of license on that date did not exceed 35,000; and, (6) there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system. *See* 47 U.S.C. §534(h)(2); 47 C.F.R. §76.55(d).

3. In his complaint, Mr. Norman states that W53AO-TV is a low power television station licensed to serve Lenoir, North Carolina, and which meets the requirements under Part 74 of the Commission's rules. He also asserts that the station broadcasts 24 hours per day and meets all obligations under Part 73 of the Rules regarding the broadcast of nonentertainment programming, programming and rates involving political candidates, election issues, controversial issues of public importance, editorials and personal attacks, programs for children and equal employment opportunity. Further, he notes that W53AO-TV addresses local news and informational needs and that Lenoir receives very little attention from any existing full power television station due to the distance from these stations and the small size of Lenoir. He contends that W53AO-TV complies with the Commission's interference regulations for low power stations and that W53AO-TV's transmitter is located approximately 4 miles from the Crown Cable headend in Lenoir and delivers a good over-the-air signal to the site. Finally, he notes that Lenoir is located outside of the largest 160 MSA's, that the population of Lenoir, according to the 1990 Census, was 14,192, and that there are no full power television stations licensed to or located in Lenoir or Caldwell County, North Carolina.

4. Mr. Norman asserts that he sent a letter to the manager of the Crown Cable system in Lenoir on April 22, 1993, requesting carriage of W53AO-TV on the cable system in Lenoir, but that he received no response from Crown Cable. On June 17, 1993, Mr. Norman sent a second request to Crown Cable. The only correspondence Mr. Norman received from Crown Cable was the channel line-up for the Caldwell County system. Mr. Norman alleges that this line-up is incorrect in that Crown was carrying 36, rather than 35, channels, and that the channel placement is also incorrect. Mr. Norman requests that the Commission require Crown Cable to carry W53AO-TV on its cable system in Lenoir, North Carolina.

5. We find that W53AO-TV is a qualified low power television station. Accordingly, the complaint filed on July 19, 1993, by Ralph Gene Norman, IS GRANTED in accordance with §614(c) of the Communications Act, 47 U.S.C. §534(c) and Crown Cable IS ORDERED to commence carriage of low power television station W53AO-TV forty-six (46) days from the release date of this Order. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] Section 614(h)(2)(B) provides that the LPTV station must meet "all obligations and requirements applicable to television broadcast stations under part 73 of title 47, Code of Federal Regulations, with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity; and the Commission [must] determine[] that the provision of such programming by such station would address local news and informational needs which are not being adequately served by full power television broadcast stations because of geographic distance of such full power stations from the low power station's community of license." 47 U.S.C. § 534(h)(2)(B); 47 C.F.R. § 76.55(d).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Complaint of Greater Dayton Public Television against TCI Cablevision of Indiana, Inc. CSR-3939-M

Request for Carriage

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 9, 1993; Released: December 9, 1993**

By the Chief, Mass Media Bureau:

1. On July 19, 1993, Greater Dayton Public Television ("Greater Dayton"), licensee of WPTO-TV, Oxford, Ohio, filed a complaint against TCI Cablevision of Indiana, Inc. ("TCI"), pursuant to §615 of the Communications Act, 47 U.S.C. §535. Greater Dayton requests that the Commission order TCI to carry WPTO-TV on TCI's cable system serving Richmond, Indiana, and that WPTO-TV be carried on Channel 14.

2. Pursuant to §615(b) of the Communications Act of 1934, as amended, with respect to a cable system with more than 36 channels, a cable operator must carry on its cable system any qualified local noncommercial educational television station requesting carriage. 47 U.S.C. §535(b)(1).[1] A television station that is licensed by the Commission as a noncommercial educational television station and is owned and operated by a public agency, nonprofit foundation, corporation or association that is eligible to receive a community service grant from the Corporation for Public Broadcasting will be considered a qualified noncommercial educational television station. *See* 47 U.S.C. §535(l)(1)(A); 47 C.F.R. §76.55(a)(1). A qualified noncommercial educational television station which is licensed to a principal community whose reference point, as defined in 47 C.F.R. §76.53, is within 50 miles of the principal headend of the cable system will be considered local. *See* 47 U.S.C. §535(l)(2)(A); 47 C.F.R. §76.55(b)(1). Notwithstanding the above, however, a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television system which does not deliver to the cable system's principal headend a signal of good quality or baseband video signal. *See* 47 U.S.C. §535(g)(4).

3. Greater Dayton contends that WPTO-TV is a qualified local noncommercial educational television station and therefore it has the right to carriage on TCI's Richmond, Indiana, 37-channel cable system. We agree. Greater Dayton has presented the following evidence with respect to WPTO-TV: WPTO-TV is licensed as a noncommercial television station; it is owned by Greater Dayton, a nonprofit corporation; it is eligible to receive a community service grant from the Corporation for Public Broadcasting, and; it is licensed to Oxford, Ohio, whose reference point, according to §76.53, is within 50 miles of the principal headend of TCI's Richmond, Indiana cable system. Accordingly, WPTO-TV meets the Commission's definition of a qualified local noncommercial educational television station. In addition, Greater Dayton notes, in its correspondence with Greater Dayton, TCI has not indicated any signal quality deficiencies or copyright concerns with respect to carriage of WPTO-TV. Greater Dayton has submitted two letters, dated May 19, 1993, and June 17, 1993, which it sent to TCI requesting carriage on Channel 14. Greater Dayton also submitted a June 1, 1993 letter from TCI containing TCI's channel lineup for its cable system, which lineup does not include WPTO-TV.

4. According to §615(g)(5), a qualified local noncommercial educational station carried pursuant to must-carry requirements must appear on the cable system channel number on which it is broadcast over-the-air, or on the channel on which it was carried on July 19, 1985, at the election of the station, or on such other channel as is mutually agreed upon by the station and the cable operator. 47 U.S.C. §535(g)(5); 47 C.F.R. §76.57(b). Because Greater Dayton has elected that WPTO-TV be carried on its over-the-air channel, Channel 14, we will grant its request that the Commission order TCI to carry WPTO-TV on Channel 14.

5. In view of the above, the complaint filed on July 19, 1993 by Greater Dayton Public Television, licensee of WPTO-TV, Oxford, Ohio (CSR-3939-M) IS GRANTED, in accordance with §615(j)(3) of the Communications Act of 1934, as amended, (47 U.S.C. §535). Furthermore, TCI Cablevision of Indiana, Inc. IS ORDERED to commence carriage of WPTO-TV on Channel 14 within forty-six (46) days from the release date of this *Order* on its system serving Richmond, Indiana. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's rules, 47 C.F.R. §0.283.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] A cable system with more than 36 channels which is required to carry the signals of three qualified local noncommercial educational television stations is not required, however, to carry the signals of additional such stations the programming of which substantially duplicates the programming broadcast by another qualified local noncommercial educational television station requesting carriage. *See* 47 U.S.C. § 535(e). *See* 47 C.F.R. § 76.56(a)(1) for the definition of substantial duplication.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

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| Complaint of Central Missouri State University against Douglas Cable Communications | CSR-3958-M |
| Request for Carriage | |

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 9, 1993; Released: December 9, 1993**

By the Chief, Mass Media Bureau:

1. On July 8, 1993, Central Missouri State University ("CMSU"), licensee of KMOS-TV, Sedalia, Missouri, filed a complaint against Douglas Cable Communications ("Douglas Cable"), pursuant to Section 615 of the Communications Act, 47 U.S.C. § 535. CMSU requests that the Commission order Douglas Cable to carry KMOS-TV on Douglas Cable's cable system serving Nelson, Missouri, and that KMOS-TV be carried on Channel 6.

2. Section 615 of the Communications Act of 1934, as amended, requires a cable system to carry the signals of qualified local noncommercial educational television stations. See 47 U.S.C. § 535. A television station that is licensed by the Commission as a noncommercial educational television station and is owned and operated by a public agency, nonprofit foundation, corporation or association that is eligible to receive a community service grant from the Corporation for Public Broadcasting will be considered a qualified noncommercial educational television station. *See* 47 U.S.C. § 535(l)(1)(A); 47 C.F.R. § 76.55(a)(1). A qualified noncommercial educational television station whose Grade B service contour encompasses the principal headend of the cable system will be considered local. *See* 47 U.S.C. § 535(l)(2)(A); 47 C.F.R. § 76.55(b)(2).

3. CMSU contends that KMOS-TV is a qualified local noncommercial educational television station and therefore it has the right to carriage on Douglas Cable's Nelson, Missouri, cable system. We agree. CMSU has presented the following evidence with respect to KMOS-TV: KMOS-TV is licensed as a noncommercial television station; it is owned by the Board of Regents at Central Missouri State University, a public agency operating under the laws of the state of Missouri; it is eligible to receive a community service grant from the Corporation for Public Broadcasting, and; its Grade B service contour encompasses the entire municipality of Nelson, Missouri. CMSU states that Douglas Cable has not responded to CMSU's request for the geographic location of the principal headend of Douglas Cable's Nelson cable system, but that CMSU "infer[s] that the headend is located at or near Nelson, the location of which is within KMOS-TV's Grade-B broadcast area." Accordingly, KMOS-TV meets the Commission's definition of a qualified local noncommercial educational television station. CMSU has submitted a November 25, 1992 letter which it sent to Douglas Cable requesting carriage on Channel 6. According to CMSU, Douglas Cable has neither commenced carriage nor responded in any way to CMSU's request for carriage and channel positioning.

4. According to Section 615(g)(5), a qualified local noncommercial educational station carried pursuant to must-carry requirements must appear on the cable system channel number on which it is broadcast over-the-air, or on the channel on which it was carried on July 19, 1985, at the election of the station, or on such other channel as is mutually agreed upon by the station and the cable operator. 47 U.S.C. § 535(g)(5); 47 C.F.R. § 76.57(b). Because CMSU has elected that KMOS-TV be carried on its over-the-air channel, Channel 6, we will grant its request that the Commission order Douglas Cable to carry KMOS-TV on Channel 6.

5. In view of the above, the complaint filed on July 8, 1993 by Central Missouri State University, licensee of KMOS-TV, Sedalia, Missouri (CSR-3958-M) IS GRANTED, in accordance with Section 615(j)(3) of the Communications Act of 1934, as amended, (47 U.S.C. § 535). Furthermore, Douglas Cable Communications IS ORDERED to commence carriage of KMOS-TV on Channel 6 within forty-six (46) days from the release date of this *Order* on its system serving Nelson, Missouri. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Complaint of Greater Dayton Public Television against Oak Cable Systems — CSR-3941-M

Request for Carriage

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 9, 1993; Released: December 9, 1993**

By the Chief, Mass Media Bureau:

1. On July 19, 1993, Greater Dayton Public Television ("Greater Dayton"), licensee of WPTO-TV, Oxford, Ohio, filed a complaint against Oak Cable Systems ("Oak Cable"), pursuant to §615 of the Communications Act, 47 U.S.C. §535. Greater Dayton requests that the Commission order Oak Cable to carry WPTO-TV on Oak Cable's cable system serving Waldron, Indiana, and that WPTO-TV be carried on Channel 14.

2. Section 615 of the Communications Act of 1934, as amended, requires a cable system to carry the signals of qualified local noncommercial educational television stations. *See* 47 U.S.C. §535. A television station that is licensed by the Commission as a noncommercial educational television station and is owned and operated by a public agency, nonprofit foundation, corporation or association that is eligible to receive a community service grant from the Corporation for Public Broadcasting will be considered a qualified noncommercial educational television station. *See* 47 U.S.C. §535(l)(1)(A); 47 C.F.R. §76.55(a)(1). A qualified noncommercial educational television station which is licensed to a principal community whose reference point, as defined in 47 C.F.R. §76.53, is within 50 miles of the principal headend of the cable system will be considered local. *See* 47 U.S.C. §535(l)(2)(A); 47 C.F.R. §76.55(b)(1). Notwithstanding the above, however, a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television system which does not deliver to the cable system's principal headend a signal of good quality or baseband video signal. *See* 47 U.S.C. §535(g)(4).

3. Greater Dayton contends that WPTO-TV is a qualified local noncommercial educational television station and therefore it has the right to carriage on Oak Cable's Waldron, Indiana, cable system. We agree. Greater Dayton has presented the following evidence with respect to WPTO-TV: WPTO-TV is licensed as a noncommercial television station; it is owned by Greater Dayton, a nonprofit corporation; it is eligible to receive a community service grant from the Corporation for Public Broadcasting, and; it is licensed to Oxford, Ohio, whose reference point, according to §76.53, is within 50 miles of the principal headend of Oak Cable's Waldron, Indiana cable system, located in St. Paul, Indiana. Accordingly, WPTO-TV meets the Commission's definition of a qualified local noncommercial educational television station. Greater Dayton has submitted a May 28, 1993 letter which it sent to Oak Cable requesting carriage on Channel 14. According to Greater Dayton, Oak Cable has neither commenced carriage nor responded in any way to Greater Dayton's request for carriage, nor has Oak Cable submitted to Greater Dayton its channel lineup for the Waldron system.

4. According to §615(g)(5), a qualified local noncommercial educational station carried pursuant to must-carry requirements must appear on the cable system channel number on which it is broadcast over-the-air, or on the channel on which it was carried on July 19, 1985, at the election of the station, or on such other channel as is mutually agreed upon by the station and the cable operator. 47 U.S.C. §535(g)(5); 47 C.F.R. §76.57(b). Because Greater Dayton has elected that WPTO-TV be carried on its over-the-air channel, Channel 14, we will grant its request that the Commission order Oak Cable to carry WPTO-TV on Channel 14.

5. In view of the above, the complaint filed on July 19, 1993 by Greater Dayton Public Television, licensee of WPTO-TV, Oxford, Ohio (CSR-3941-M) IS GRANTED, in accordance with §615(j)(3) of the Communications Act of 1934, as amended, (47 U.S.C. §535). Furthermore, Oak Cable Systems IS ORDERED to commence carriage of WPTO-TV on Channel 14 within forty-six (46) days from the release date of this *Order* on its system serving Waldron, Indiana. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's rules, 47 C.F.R. §0.283.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Complaint of Greater Dayton Public Television against Oak Cable Systems — CSR-3940-M

Request for Carriage

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 9, 1993; Released: December 9, 1993**

By the Chief, Mass Media Bureau:

1. On July 19, 1993, Greater Dayton Public Television ("Greater Dayton"), licensee of WPTO-TV, Oxford, Ohio, filed a complaint against Oak Cable Systems ("Oak Cable"), pursuant to §615 of the Communications Act, 47 U.S.C. §535. Greater Dayton requests that the Commission order Oak Cable to carry WPTO-TV on Oak Cable's cable system serving St. Paul (Decatur County), Indiana, and that WPTO-TV be carried on Channel 14.

2. Section 615 of the Communications Act of 1934, as amended, requires a cable system to carry the signals of qualified local noncommercial educational television stations. *See* 47 U.S.C. §535. A television station that is licensed by the Commission as a noncommercial educational television station and is owned and operated by a public agency, nonprofit foundation, corporation or association that is eligible to receive a community service grant from the Corporation for Public Broadcasting will be considered a qualified noncommercial educational television station. *See* 47 U.S.C. §535(l)(1)(A); 47 C.F.R. §76.55(a)(1). A qualified noncommercial educational television station which is licensed to a principal community whose reference point, as defined in 47 C.F.R. §76.53, is within 50 miles of the principal headend of the cable system will be considered local. *See* 47 U.S.C. §535(l)(2)(A); 47 C.F.R. §76.55(b)(1). Notwithstanding the above, however, a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television system which does not deliver to the cable system's principal headend a signal of good quality or baseband video signal. *See* 47 U.S.C. §535(g)(4).

3. Greater Dayton contends that WPTO-TV is a qualified local noncommercial educational television station and therefore it has the right to carriage on Oak Cable's St. Paul, Indiana, cable system. We agree. Greater Dayton has presented the following evidence with respect to WPTO-TV: WPTO-TV is licensed as a noncommercial television station; it is owned by Greater Dayton, a nonprofit corporation; it is eligible to receive a community service grant from the Corporation for Public Broadcasting, and; it is licensed to Oxford, Ohio, whose reference point, according to §76.53, is within 50 miles of the principal headend of Oak Cable's St. Paul, Indiana cable system. Accordingly, WPTO-TV meets the Commission's definition of a qualified local noncommercial educational television station. Greater Dayton has submitted a May 28, 1993 letter which it sent to Oak Cable requesting carriage on Channel 14. According to Greater Dayton, Oak Cable has neither commenced carriage nor responded in any way to Greater Dayton's request for carriage, nor has Oak Cable submitted to Greater Dayton its channel lineup for the St. Paul system.

4. According to §615(g)(5), a qualified local noncommercial educational station carried pursuant to must-carry requirements must appear on the cable system channel number on which it is broadcast over-the-air, or on the channel on which it was carried on July 19, 1985, at the election of the station, or on such other channel as is mutually agreed upon by the station and the cable operator. 47 U.S.C. §535(g)(5); 47 C.F.R. §76.57(b). Because Greater Dayton has elected that WPTO-TV be carried on its over-the-air channel, Channel 14, we will grant its request that the Commission order Oak Cable to carry WPTO-TV on Channel 14.

5. In view of the above, the complaint filed on July 19, 1993 by Greater Dayton Public Television, licensee of WPTO-TV, Oxford, Ohio (CSR-3940-M) IS GRANTED, in accordance with §615(j)(3) of the Communications Act of 1934, as amended, (47 U.S.C. §535). Furthermore, Oak Cable Systems IS ORDERED to commence carriage of WPTO-TV on Channel 14 within forty-six (46) days from the release date of this *Order* on its system serving St. Paul, Indiana. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's rules, 47 C.F.R. §0.283.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Complaint of Southwest Indiana Public Broadcasting, Inc. against Douglas Cable Communications — CSR-3969-M

Request for Carriage

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 17, 1993; Released: December 9, 1993**

By the Chief, Mass Media Bureau:

1. On July 2, 1993, a petition on behalf of Southwest Indiana Public Broadcasting, Inc., licensee of Television Broadcast Station WNIN (Educ., Ch. 9), Evansville, Indiana, was filed with the Commission claiming that Douglas Cable Communications ("Douglas"), operator of cable television systems serving the communities of Allendale, Bone Gap, Browns, Keensburg and West Salem, Illinois, had declined to carry the station, even though the Grade B contour of WNIN encompasses the systems' principal headends at Allendale, Bone Gap, Browns, Keensburg and West Salem and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). WNIN requests that the Commission not only order Douglas to carry its signal on each of these cable systems, but also order that the systems carry it on Channel 9, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.

2. WNIN's petition establishes that it is entitled to carriage on the Allendale, Bone Gap, Browns, Keensburg and West Salem cable systems, and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under Section 5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed July 2, 1993, by Southwest Indiana Public Broadcasting, Inc. IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Douglas Cable Communications IS ORDERED to commence carriage of WNIN on cable channel 9 forty-five (45) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

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|---|---|
| Complaint of Greater Dayton | CSR-3937-M |
| Public Television against | CSR-3933-M |
| TCI Cablevision of | IN0025 |
| Indiana, Inc. | |
| Request for Carriage | |

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 17, 1993; Released: December 9, 1993**

By the Chief, Mass Media Bureau:

1. On July 19, 1993, petitions on behalf of Greater Dayton Public Television, licensee of Television Broadcast Stations WPTO (Educ., Ch. 14), Oxford, Ohio and WPTD (Educ., Ch. 16), Dayton, Ohio, were filed with the Commission claiming that TCI Cablevision of Indiana, Inc. ("TCI"), operator of a cable television system serving Winchester, Indiana, had declined to carry the station, even though, allegedly, the Grade B contour of WPTD encompasses the system's principal headend at north latitude 40° 11' 00" and west longitude 84° 59' 31" and Oxford, the city of license of WPTO is within fifty miles of the same location. Both stations, therefore, are "local" signals within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). WPTO and WPTD both request that the Commission not only order TCI to carry their signals, but also order that the system carry them on channels 14 and 16, respectively, the channels on which they broadcast over-the-air. No opposition to these petitions has been filed.

2. Staff review of the issues raised and of the materials submitted in WPTD's petition fails to demonstrate that TCI's headend lies within WPTD's Grade B contour.[1] Therefore, the 1992 Cable Act does not entitle WPTD to mandatory carriage on the TCI cable television system serving Winchester, Indiana, and the complaint filed July 19, 1993, by Greater Dayton Public Television (CSR-3933-M) IS DISMISSED pursuant to §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended.

3. WPTO's petition, however, establishes that it is entitled to carriage on the Winchester cable system because Oxford, Ohio, the city of license of WPTO, is within fifty miles of TCI's headend.[2] WPTO has requested carriage on its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed July 19, 1993, by Greater Dayton Public Television (CSR-3937-M) IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and TCI Cablevision of Indiana, Inc. IS ORDERED to commence carriage of WPTO on cable channel 14 forty-six (46) days from the release date of this *Order*. These actions are taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] Calculations for Grade B contours of television stations are based upon the current licensed parameters of the television stations(s) in question and using the methods set forth in §73.684 of the Commission's Rules (Prediction of Coverage).

[2] The distance computations are based upon the reference point(s) (for the television station's community of license) in §76.53 of the Commission's Rules and the principal headend coordinates provided in the petition and applying the methods in §73.611 of the Commission's Rules (Reference Points and Distance Computation).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

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|---|---|
| ACT III BROADCASTING OF NASHVILLE, INC. | CSR-3875-A VA0/0/42 |

For Modification of Television Broadcast Station WNRW's ADI

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 22, 1993; Released: December 10, 1993**

By the Chief, Mass Media Bureau:

**INTRODUCTION**

1. Act III Broadcasting of Nashville, Inc. ["WNRW"], licensee of Television Broadcast Station WNRW (Fox, Channel 45), Winston-Salem, North Carolina, has filed the captioned petition for special relief seeking to include the community of Martinsville, Virginia, within the Greensboro--Winston-Salem--High Point, North carolina "area of dominant influence" for purposes of the cable television mandatory broadcast signal carriage rules. WNRW's petition is opposed by Roanoke-Lynchburg TV Acquisition Corp. ["WVFT"], licensee of Television Broadcast Station WVFT (Fox, Channel 27), Roanoke, Virginia, and by Multi-Channel T.V. Cable Company d/b/a Adelphia Cable Communications ["Adelphia"], operator of a cable television system serving Martinsville, Virginia.[1] WNRW has replied.

**BACKGROUND**

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][2] and implementing rules adopted by the Commission in its *Report and Order in MM Docket No. 92-259*,[3] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. This section of the 1992 Cable Act also provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located 0* ( (0"in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[6]

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

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[1] Adelphia's system serves several neighboring communities in addition to Martinsville. However, WNRW's petition solely addresses Martinsville.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] 8 FCC Rcd 2965, 2976-2977 (1993).

[4] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[5] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how see Arbitron's *Description of Methodology*.

[6] 47 U.S.C. §534(h)(1)(C)(ii).

* * * * *

> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[7]

5. The Commission provided guidance in *MM Docket No. 92-259, supra,* to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.

*Id.* at 2977 (emphasis in original).

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[10] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (*i.e.*, when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

## MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. Martinsville is located in Henry County, Virginia, which is located within the Roanoke-Lynchburg, Virginia ADI. Henry County is adjacent to the Greensboro--Winston-Salem--High Point ADI, just east of and contiguous to Patrick County, Virginia, which is included within the latter ADI. Martinsville is situated some 45 miles northnortheast of Winston-Salem.

9. In support of its petition, WNRW notes that it has been carried on Adelphia's Martinsville system since at least 1987, and states that other Winston-Salem area licensees also have enjoyed cable carriage in the community. WNRW submits a map showing that the station's City grade contour covers most of Martinsville, which is completely encompassed by WNRW's Grade A contour, which also covers approximately 90 percent of Henry County. In addition, WNRW states that it has a weekly public affairs program that covers many important issues affecting Martinsville residents, and that "the station has made significant outreach efforts to the children of Martinsville."[11] WNRW also states that no television station is licensed to Martinsville. Finally, WNRW states that it has been found to be significantly viewed in Henry County,[12] and argues that it "continues to hold a large audience from Henry County today," based on Nielsen data which the station submits.

10. In opposition to WNRW's petition, WVFT initially argues that the petition should be dismissed because it was not served on WVFT, a clearly interested party. Substantively, WVFT contends that WNRW fails to indicate any specific programming it provides "directed at the needs and interests of Martinsville." WVFT also contends that countywide viewership data may not accurately reflect viewing patterns in specific communities, and urges that community-specific data be required as a basis for relief, citing *KOIN-TV, Inc.*, 93 FCC 2d 186 (1983); *Pott County Cable*

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7 H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

8 *MM Docket No. 92-259*, 8 FCC Rcd at 2977, 2977 n.139.

9 47 C.F.R. §76.59.

10 *MM Docket No. 92-259*, 8 FCC Rcd at 2981.

11 WNRW notes that of the 341 members of its "Kids Club" from Henry County, 253 are from Martinsville.

12 WNRW was found to be significantly viewed in Henry County in 1983. *See Good News TV, Inc.*, Cable Television Action Report No. 2714 (released February 28, 1983). For an independent station to be deemed to be significantly viewed in a community or a county, it must achieve in noncable homes a share of viewing hours of at least 2 percent (total week hours) and a net weekly circulation of at least 5 percent. 47 C.F.R. §76.5(i).

*Television, Inc.*, 48 RR 2d 30 (1980); and *Gulf Coast CableVision, Ltd.*, 53 FCC 2d 1156 (1975). Finally, WVFT claims that WNRW "has not been carried on the Martinsville cable system for several months," thus indicating that WNRW's submissions concerning its cable viewership are out-of-date.

11. Adelphia argues in opposition to WNRW that the station's submission of county-wide viewership data from a single year is not probative of viewing patterns in Martinsville itself. In addition, Adelphia notes that it presently carries WVFT, which is a closer Fox affiliate to Adelphia than is WNRW--39.89 miles from Adelphia's headend to Roanoke for WVFT, as opposed to 45.39 miles from Adelphia's headend to Winston-Salem for WNRW. Accordingly, states Adelphia, even were WNRW's petition to be granted, Adelphia would not be required to carry WNRW pursuant to the 1992 Cable Act[13] and to the Commission's Rules.[14]

12. In reply, WNRW claims that WVFT has not been prejudiced by its failure to be served, as it learned of WNRW's petition and was able to file an opposition. WNRW further asserts that Adelphia's argument concerning duplication between WNRW and WVFT is irrelevant to the substance of WNRW's petition.

## ANALYSIS AND DECISION

13. We shall grant WNRW's petition. We first note that WNRW has demonstrated a history of carriage on Adelphia's cable system serving Martinsville. That the station has recently been dropped from the system appears to be due to the implementation of the Commission's new signal carriage rules, and is precisely the action which the ADI market modification rules were adopted to prevent and rectify. Second, WNRW has shown that it provides coverage of and service to Martinsville. The station's predicted Grade B contour encompasses the community. We have previously stated that this is sufficient to satisfy this factor.[15] While this may be challenged by a demonstration that a given station in fact does not provide actual programming to a community or communities at issue, WVFT does not do this, but merely states that WNRW has not enumerated its specific programming directed toward the interests and needs of Martinsville. This is not a sufficient rebuttal to WNRW's submission on this point. With respect to the fourth factor, WNRW has been found to be significantly viewed in Henry County, in which Martinsville is located, and continues to achieve this level of viewing, both in cable and in noncable households.[16] We recognize that this determination is based on county-wide data, rather than on community-specific data. Absent evidence that such data are not fairly reflective of viewing in the actual communities in question, we shall accept such data as probative, although not conclusive, in cases of this type. Both WVFT and Adelphia merely suggest that county-wide data might not be reflective of specific viewing patterns in Martinsville, but fail to provide any evidence to support their speculation. Accordingly, we shall accept WNRW's submission on this point, too.

14. WNRW satisfies the first, second, and fourth factors in the 1992 Cable Act with respect to Martinsville. With respect to the third factor, WNRW merely states that no television station is licensed to Martinsville. This is not relevant to the question of whether there are other stations serving the community that are eligible to be carried on Adelphia's system. Nevertheless, we do not believe that Congress intended the third criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe that this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. Under such circumstances, a denial of carriage rights to the claiming station could deprive cable viewers of any broadcast signals that might provide programming geared to their communities. In this case, because other stations do appear to serve Martinsville, this enhancement factor would not appear applicable. WNRW's showing on each of the other factors, however, is sufficient and, even absent enhancement under the third criterion, warrants grant of its request.[17]

15. Accordingly, for purposes of determining mandatory signal carriage obligations, we shall consider the community of Martinsville, Virginia, to be part of the Greensboro--Winston-Salem--High Point, North Carolina ADI with respect to WNRW, as well as within the Roanoke-Lynchburg, Virginia ADI. This determination is subject to all generally applicable limitations on signal carriage rights, including copyright liability, signal quality, channel capacity, and program duplication. *See* paragraph 7, *supra*.

## ORDER

16. In view of the foregoing, we find that grant of WNRW's petition is in the public interest.

17. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), That the captioned petition for special relief filed June 2, 1993 by Act III Broadcasting of Nashville, Inc. IS GRANTED. This change shall be effective in accordance with the following schedule: WNRW shall notify Multi-Channel T.V. Cable Company d/b/a Adelphia Cable Communications in writing of its carriage and channel position elections (§§76.56, 76.57, and 76.64(f) of the Commission's Rules) within 30 days of the release date of this *Memorandum Opinion and Order*. The affected cable systems shall come into compliance with the applicable rules within 45 days of the above notice.

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[13] 47 U.S.C. §534(b)(5).

[14] 47 C.F.R. §76.56(b)(5).

[15] *MM Docket No. 92-259*, 8 FCC Rcd at 2977. *See also* paragraph 5, *supra*.

[16] According to recent Arbitron data, WNRW achieves a share of viewing hours in noncable homes of 7 percent and a net weekly circulation of 48 percent. In cable homes the station's share of viewing hours is 6 percent and its net weekly circulation is 66 percent. Arbitron, *Television County Coverage: Virginia/District of Columbia* (Cable Controlled Counties), 1992. *See also* footnote 12, *supra*.

[17] We agree with WNRW that WVFT has not been prejudiced by WNRW's failure to serve its petition on WVFT. We also agree with WNRW that the question of carriage of eligible but duplicating stations by Adelphia is separate from the ADI modification request before us. *See* paragraph 7, *supra*, and paragraph 15, *infra*.

18. This action is taken by the Chief, Mass Media Bureau pursuant to authority delegated by §0.283 of the Commission's Rules.[18]

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[18] Pursuant to *MM Docket No. 92-259*, 8 FCC Rcd at 2978 n. 150, the Chief, Mass Media Bureau is authorized to act on requests for the inclusion or elimination of specific communities from local markets in accordance with the factors set forth in the 1992 Cable Act.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: December 2, 1993**

**CLARIFICATION OF PLEADING CYCLE FOR REPLIES TO PETITIONS FOR RECONSIDERATION IN THE EXPANDED INTERCONNECTION PROCEEDING CC DOCKET 91-141**

On November 2, 1993 the Commission released a Public Notice (Report No. 1981) listing the Petitions for Reconsideration, Partial Reconsideration, and Clarification that were filed in response to two Orders in the Expanded Interconnection proceeding released on September 2, 1993 (FCC 93-378 and FCC 93-379). Report No. 1981 was inadvertently published in the Federal Register at two different times. It was initially published in the Federal Register on November 8, 1993 (58 FR 59266), stating that oppositions must be filed by November 23, 1993 and replies filed 10 days later. Report No. 1981 was inadverently published again in the Federal Register on November 24, 1993 (58 FR 62126), stating that oppositions would be due on December 9, 1993, and replies due 10 days later.

To avoid confusion for parties interested in responding to the Petitions (listed below), we are clarifying the dates for filing replies to these petitions. All replies to the oppositions must be filed with the Commission by December 9, 1993. No replies filed after that date will be accepted.

**SPECIAL ACCESS (FCC 93-378)**

**PETITIONS FOR RECONSIDERATION**

WilTel Inc.

United States Telephone Association

**PETITIONS FOR PARTIAL RECONSIDERATION**

Ameritech

MFS Communications Company, Inc.

**SWITCHED TRANSPORT (FCC 93-379)**

**PETITIONS FOR RECONSIDERATION**

Association For Local Telecommunications Services

Competitive Telecommunications Association

GTE Service Corporation

Hyperion Telecommunications, Inc.

MCI Telecommunications Corporation

National Association of Regulatory Utility Commissioners

Sprint Communications Co.

Teleport Communications Group Inc.

WilTel Inc.

**PETITIONS FOR PARTIAL RECONSIDERATION**

MFS Communications Company, Inc.

**PETITIONS FOR RECONSIDERATION AND CLARIFICATION**

Rochester Telephone Corporation

United States Telephone Association

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 90-84**

In re Applications of

RADIO REPRESENTATIVES, INC. File No. BPH-870910MD

KASA MOKU KA PAWA BROADCASTING, INC. File No. BPH-870910MZ

For Construction Permit for New FM Station, Channel 290C, Honolulu, Hawaii

**ORDER**

**Adopted: November 29, 1993; Released: December 10, 1993**

By the Commission:

1. Before the Commission is an application for review of a Review Board decision, *Radio Representatives, Inc.*, 7 FCC Rcd 6052 (1992), *recon. denied*, 8 FCC Rcd 3636 (1993), granting the application of Kasa Moku Ka Pawa Broadcasting, Inc. (KMKP) for a new FM station at Honolulu, Hawaii, and denying the application of Radio Representatives, Inc. (RRI).[1] Having thoroughly reviewed the pleadings, the record, and the Board's decision, we agree with the Board's disposition of this case and affirm its decision. However, one matter warrants brief comments.

2. Throughout this proceeding RRI has maintained that its depiction of Honolulu (the so-called Judicial District, or the land area within urban Honolulu and Waikiki) is the proper definition of that city for determining whether the applicants' proposals comply with the city-grade coverage requirement of 47 C.F.R. § 73.315(a). The Board in its decision rejected that definition (7 FCC Rcd at 6053-54 ¶ 11 and n.6), and, in its instant appeal, RRI continues to urge the adoption of its definition of the boundaries of Honolulu. In light of the determination in this case to rely on the standard prediction methodology specified in 47 C.F.R. § 73.313, Honolulu, whether defined as RRI urges or as encompassing all of the Island of Honolulu and certain northwestern islands which KMKP urges, will receive the required city-grade service from both of the applicants' proposals. Therefore, there is no need to consider the purely academic question raised by RRI. *See Deep South Broadcasting Co. v. FCC*, 278 F.2d 264, 266 (D.C. Cir. 1960) (an agency, like a court, need not decide questions which are not relevant to its decision).

3. ACCORDINGLY, IT IS ORDERED pursuant to 47 C.F.R. § 1.115(g) that the Application for Review filed June 24, 1993, by Radio Representatives, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] An Application for Review was filed on June 24, 1993, and Oppositions thereto were filed on July 9, 1993, by the Mass Media Bureau and on July 14, 1993, by KMKP.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-275**

In re Applications of

FLAGSTAFF BROADCASTING FOUNDATION — File No. BPH-860707NQ

FLAGSTAFF BROADCASTING PARTNERSHIP — File No. BPH-860707OC

For Construction Permit for a New FM station in Flagstaff, Arizona

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 22, 1993; Released: December 10, 1993**

By the Commission:

1. In this Memorandum Opinion and Order, we grant the application of Flagstaff Broadcasting Partnership (Partnership) for a new FM radio station in Flagstaff, Arizona, and deny the competing application of Flagstaff Broadcasting Foundation (Foundation).

## I. BACKGROUND

2. Previously, the Commission upheld a decision by the Review Board concluding that Partnership was preferred over Foundation under the criteria enunciated in the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). *Julia S. Zozaya*, 5 FCC Rcd 856 (Rev. Bd. 1990), *rev. denied*, 5 FCC Rcd 6607 (1990). *See also Julia S. Zozaya*, 4 FCC Rcd 6271 (I.D. 1989). Partnership received a decisive preference over Foundation for its proposal to integrate its ownership into management, since both of Partnership's owners promised to work full-time at the station. 4 FCC Rcd at 6274 ¶ ¶ 28-29, 31. By contrast, the five principals of Foundation (a not-for-profit corporation) proposed no integration of ownership into management. *Id.* at 6273 ¶ ¶ 19-20.

3. Instead, Foundation's five directors proposed to establish station policies and to hire staff, who would work at the station on a day-to-day basis, to implement those policies. 4 FCC Rcd at 6273 ¶ 20. Although Foundation's proposal did not conform to established Commission policy (*see* 1 FCC 2d at 395), Foundation nonetheless argued that it was entitled to credit equivalent to Partnership's. The ALJ, Board, and Commission rejected this argument. 4 FCC Rcd at 6276 ¶ 59, 6277 n.3; 5 FCC Rcd at 858 ¶ 16; 5 FCC Rcd at 6608 ¶ 5.

## II. COURT OF APPEALS

4. On appeal, the United States Court of Appeals for the District of Columbia Circuit remanded the case to the Commission for further consideration. *Flagstaff Broadcasting Foundation v. FCC*, 979 F.2d 1566 (D.C. Cir. 1992). The court held that the Commission had failed to respond to Foundation's argument that the Commission's continued adherence to its "narrow definition of integration" was unjustified and that Foundation's proposal would accomplish the goals that the Commission had established. 979 F.2d at 1569. The court stated that: "Foundation is . . . entitled to a reasoned response to its specific claim that its proposal would further the stated objective of the integration policy better than its competitors." *Id.* at 1571.

5. Following issuance of the court's opinion, the Commission had occasion in the Selbyville, Delaware proceeding, which involved a similar challenge to the Commission's application of its integration criterion, to address the court's concerns. *Anchor Broadcasting Limited Partnership*, 8 FCC Rcd 1674 (1993), *appeal pending sub nom. Bechtel v. FCC*, No. 93-1264 (D.C. Cir., filed April 9, 1993) (and consolidated cases). There, the Commission provided further justification for continuing to apply established policy.

6. The Commission explained that -- in the exercise of its broad discretion to make such judgments -- it had concluded that applicants proposing integration were more likely to be responsive to the needs of the community and to effectuate their proposals and policies. 8 FCC Rcd at 1675-76 ¶ ¶ 13-14. The Commission based this judgment on findings that: (1) integrated owners have demonstrated an active interest in the operation of the station; (2) integrated owners have been in a better position to be aware of community requests to the station and of the possibility that the station might not be in compliance with Commission rules; and (3) integration has put day-to-day control of station operations in the hands of those individuals with the most authority over, direct financial interest in, and legal accountability for the station. *Id.* at 1676 ¶ 15.

7. The Commission further explained that -- based on its experience -- reliance on structural factors, such as integration, provided a more reliable basis for judgment than attempting to examine functional proposals, like Foundations's, on an *ad hoc* basis. 8 FCC Rcd at 1676 ¶ 16. Finally, the Commission concluded that the possibility that it might modify its integration policy in the future did not militate against applying the policy in this and other pending cases. *Id.* at 1676 ¶ ¶ 17-18.

## III. COMMENTS

8. Pursuant to the court's opinion, the Commission invited the parties to this proceeding to comment on what further action should be taken here. *Julia S. Zozaya*, FCC 93I-020 (Apr. 2, 1993); *Flagstaff Broadcasting Foundation*, FCC 93I-025 (Apr. 23, 1993).[1] Partnership filed comments

[1] The latter order specifically sought comments regarding the impact of *Anchor* on this proceeding.

on April 12, 1993 and further comments on May 6, 1993, and Foundation filed comments on April 20, 1993 and further comments on April 30, 1993.[2]

9. Partnership contends that the Commission should not credit Foundation's proposal without giving Partnership the opportunity at hearing to test that proposal through discovery, cross examination, and rebuttal evidence. Specifically, Partnership claims that record evidence and deposition testimony indicate that Foundation's nominal principals may not actually control the applicant. Partnership notes that under established Commission policy its own integration proposal was subject to such scrutiny.

10. Partnership urges, however, that, consistent with *Anchor*, the existing record provides an ample basis to prefer Partnership. Partnership contends that the record indicates that its principals will devote their full efforts to the operation of the station and will be available to control the station and respond to problems. According to Partnership, its principals have the highest incentive for the station's successful operation because they will be legally and financially liable. Partnership claims that Foundation's principals have, by contrast, demonstrated little involvement with the station and have no financial stake in the station.

11. Foundation asks that the hearing should be reopened to explore the "theory and practice" of Foundation's "heterodox integration proposal." Foundation suggests, however, that its proposal could adequately be explored by means of cross examination and rebuttal evidence without the need for additional discovery. Foundation asserts that Partnership previously had the opportunity to develop evidence concerning Foundation's proposal but chose not to do so because of its unwarranted assumption that Foundation's proposal would not be credited. Foundation also asserts that further discovery would cause delay. Additionally, Foundation argues that further hearings should also probe Partnership's proposal so that their respective merits can be compared.

12. Foundation acknowledges, however, that the rationale of *Anchor* may moot the need for new hearings. Foundation's Comments in Response to FCC Order FCC 93I-025 (Released April 23, 1993), filed April 30, 1993 at 2. Thus, Foundation submits that there is no need for further evidentiary hearings pending the appeal of *Anchor*. *Id.*

## IV. DISCUSSION

13. We will not conduct further hearings in this case, because we believe that it is consistent with the court's remand for us to continue to apply existing integration policy if we give adequate justification for doing so. The court stated:

> In this case, the Commission refused to hear what support Foundation had for its challenge to the integration policy, and made no attempt to explain why an alternative management style would not work, except to say that "policy" prohibited it. Foundation repeatedly asserted throughout the proceedings that its proposal would further the Commission's policy objectives. All the Commission had to do was give a reason -- any rational reason -- why it did not. If the Commission had ever reviewed its policy, this probably would have been a simple task.

979 F.2d at 1570.

14. In *Anchor*, we endeavored to review our integration policy and to supply the reason that the court found lacking in our prior actions -- both here and in *Anchor*. Because we believe, for the reasons articulated in *Anchor*, that we are justified in resolving pending adjudication cases on the basis of our current integration policy, which does not credit proposals such as Foundation's, we find no need for additional factual scrutiny of Foundation's proposal. We therefore reaffirm our prior grant of Partnership's application.

## V. ORDERS

15. ACCORDINGLY, IT IS ORDERED, That the application of Flagstaff Broadcasting Partnership (File No. BPH-860707OC) IS GRANTED and the application of Flagstaff Broadcasting Foundation (File No. BPH-860703MI) IS DENIED.

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[2] According to the parties, clerical difficulties resulted in delays in their being served with copies of the orders requesting comments. We therefore accept their comments although they were late-filed. We dismiss Foundation's Request for Copy of Order of Acting General Counsel, filed April 19, 1993, as moot, since Foundation subsequently indicated that it received a copy of the order.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-86**

In re Applications of

| | |
|---|---|
| GREAT LAKES BROADCASTING, INC. | File No. BPH-870327KA |
| HURON COMMUNICATIONS COMPANY Limited Partnership | File No. BPH-870331OB |
| NCB ENTERPRISES, INC. | File No. BPH-870410KC |
| LUIPOLD BROADCASTING, INC. | File No. BPH-870415MO |

For Construction Permit for a New
FM Station on Channel 241A
Huron, Ohio

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 29, 1993; Released: December 10, 1993**

By the Commission:

1. By this action we deny Great Lakes Broadcasting, Inc.'s (Great Lakes) Petition for Reconsideration of Memorandum Opinion and Order, *Great Lakes Broadcasting, Inc.*, 8 FCC Rcd 4007 (1993) (*MO&O*).[1] In that *MO&O*, we affirmed Review Board decisions[2] upholding the determination of Administrative Law Judge Joseph P. Gonzalez (ALJ)[3] that Luipold Broadcasting, Inc. (Luipold) is the comparatively superior applicant in this proceeding and awarding the permit for a new FM facility in Huron, Ohio to Luipold.

2. In its Petition for Reconsideration, Great Lakes asserts that the Commission erred in concluding that, pursuant to 47 C.F.R. §§ 1.277(a) and 1.279, it was not required to consider arguments raised in Great Lakes' Application for Review concerning credit awarded Luipold for civic activities.[4] Specifically, in the Application for Review, Great Lakes argued that Luipold's credit on the unified residence/civic activities factor should have been diminished because the activities of the applicant's principal, Shelly Luipold, did not continue beyond 1987 and did not involve positions of leadership. In the *MO&O*, we faulted Luipold for not raising those arguments in Exceptions to the ALJ's *Initial Decision* and indicated that the public interest did not favor consideration of them at that late stage. *MO&O* at 4009 n.15.

3. Great Lakes now contends that it did not raise arguments concerning Luipold's unified residence/civic activities credit in Exceptions to the *I.D.* because the ALJ "ruled in Great Lakes' favor on [the] contentions" and that "it is axiomatic one need not appeal a decision made in one's favor." Great Lakes further argues that precluding consideration of the issues raised violates Great Lakes' due process rights. This argument is based on the premise that, when the Review Board concluded Luipold's civic activities credit outweighed Great Lakes' credit because Great Lakes' activities were "not as extensive, and ceased in 1986," it applied to Great Lakes a standard of evaluation, *i.e.*, one based on continuity, which it did not apply to Luipold and which the Commission has now likewise refused to apply to Luipold.

4. Putting aside initially the question of whether the Commission properly declined on procedural grounds to consider Great Lakes' argument that credit for Luipold's civic activities should be diminished, we note that the record does not support the argument. Specifically, with two possible exceptions,[5] there is no indication in the *I.D.* that Luipold's role in civic activities ended in 1987 or any time subsequent thereto. Furthermore, it appears that Luipold's activities involved diverse and meaningful participation in various community organizations.[6] This showing, when coupled with Luipold's long-time service-area residence, amply supports the conclusion that her credit under the unified factor is "significant." 7 FCC Rcd at 1831 ¶ 12; 8 FCC Rcd at 4008 ¶ 8.[7]

5. As to the procedural issue, we reject the argument that Great Lakes must be "excused" from failing to file Exceptions to the *I.D.* concerning Luipold's residence/civic activities credit because the ALJ "ruled in Great Lakes' favor on [the] contentions." There is no indication in the *I.D.* that the ALJ diminished Luipold's credit for civic activities on the grounds that Great Lakes urges now, or, for that matter, that he found Luipold's overall credit on the residence/civic activities factor to be less than what he awarded Great Lakes.[8] We also reject Great Lakes' due process

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[1] Great Lakes filed the Petition for Reconsideration on July 1, 1993. Luipold Broadcasting, Inc. filed an Opposition on July 14, 1993, and Great Lakes filed a Reply to the Opposition on July 22, 1993.

[2] *Decision*, 7 FCC Rcd 6548 (1992) and *Memorandum Opinion and Order*, 8 FCC Rcd 4007 (1993).

[3] *Initial Decision*, 5 FCC Rcd 2919 (1990) (*I.D.*).

[4] Pursuant to 47 C.F.R. § 1.277(a), a party waives any objection to an initial decision not saved by exception. Pursuant to 47 C.F.R. § 1.279, the Commission, in its discretion, may limit review of an initial decision to those issues raised in exceptions.

[5] The Luipold application specifies that Mrs. Luipold chaired the Sandusky Public Schools Parents/Student Orientation and Public Relations Committee in 1987 and that she was a member of the Friends of Boeckling from 1982 to 1985. *I.D.* at 2924 ¶ 46.

[6] *Id.*

[7] As noted in the *MO&O*, the credit is not maximum because Luipold lives in the service area of the proposed station but not in the actual community of license. 8 FCC Rcd at 4009 ¶ 9.

[8] The ALJ found that Luipold's gender preference outweighed the preference awarded Great Lakes for the decision of its integrated principal to move to the city of license, and that "[o]therwise, these two applicants are ... on an equal footing." *I.D.* at 2925 ¶62 . He had awarded Luipold "a moderate enhancement credit" based on her community residence and civic activities, but there is no discussion supporting Great Lakes'

argument. All of the facts on which Great Lakes relies in contending that Luipold's credit should be diminished were in the record when the Review Board rendered its decision, and we cannot agree that its evaluation of those facts involved the application of a standard different from that applied to other applicants or that its determination lacked objectivity. To the contrary, the Board noted the relevant information -- both pro and con -- concerning each of the applicants' residence and civic activities and awarded enhancement credit accordingly.[9] Thus we affirmed its decision.[10]

6. ACCORDINGLY, IT IS ORDERED That, the Petition for Reconsideration filed by Great Lakes Broadcasting, Inc. on July 1, 1993 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

contentions that this evaluation reflected the view that her civic activities had ceased or had not involved leadership positions. The Review Board subsequently addressed apparently the only argument made for awarding Luipold only "slight" credit, *i.e.*, that she did not live in the community of license. It rejected the argument and concluded that in fact she was entitled to "significant credit." 7 FCC Rcd at 1830-1831 ¶ 12.

[9] *See, e.g.*, 7 FCC Rcd at 1830 ¶ ¶ 5, 12, 15 (concerning Luipold) and ¶ 17 (concerning Great Lakes).

[10] 8 FCC Rcd at 4008-4009 ¶ ¶ 8-9.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 90-68**

In Re Applications of

| | |
|---|---|
| HARRY S. McMURRAY | File No. BPH-880301MP |
| MODESTO COMMUNICATIONS CORPORATION | File No. BPH-880301NC |
| BCD LIMITED PARTNERSHIP | File No. BPH-880301OS |
| THOM REINSTEIN COMMUNICATIONS, A California Limited Partnership | File No. BPH-880301OU |

For a Construction Permit for a New FM Station on Channel 230A, Modesto, California

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 29, 1993; Released: December 10, 1993**

By the Commission:

1. Now before the Commission are applications for review[1] of the Review Board's Decision, 8 FCC Rcd 3168 Rev. Bd. 1993), finding BCD Limited Partnership (BCD) to be the comparatively superior applicant for a new FM broadcast station in Modesto, California. The Commission affirms the Board's decision and adopts the Board's analysis and conclusions as its own except as modified herein.

## I. BACKGROUND

2. In his *Initial Decision*, 7 FCC Rcd 3404 (ALJ 1992), Chief Administrative Law Judge Joseph Stirmer found that Modesto Communications Corporation (MCC) and Thom Reinstein Communications (Reinstein) were entitled to full quantitative integration credit. The ALJ found Harry S. McMurray entitled to no integration credit because, at the time he filed his application and when he submitted his integration statement, he was contractually barred by a covenant not to compete from building and operating a station in Modesto. 7 FCC Rcd at 3424 ¶ 165. In addition, the ALJ awarded BCD only 33 1/3% integration credit because the involvement of one of its limited partners in the filing of an amendment to its application required attribution of the limited partners' interests in making the integration analysis. *Id.* at 3426 ¶ ¶ 177-78. To the contrary, however, the Board held that BCD's limited partner's sole post-formation activity, preparing and signing an amendment to the application relating to the limited partner's own media interests, at the request of BCD's general partner, did not constitute material involvement in the applicant's affairs or compromise the general partner's control over the application. Therefore, the Board held that BCD is entitled to full integration credit. 8 FCC Rcd at 3173 ¶ 17.

3. The Board's comparative analysis centered primarily on BCD and Reinstein.[2] The Board found BCD's 100% minority credit of equal significance to Reinstein's 100% local residence background credit. *Id.* at 3175 ¶ ¶ 23-24. Because the Board found BCD's broadcast experience to be superior to Reinstein's, being of longer duration and including more time in management, the Board awarded an overall integration advantage to BCD which prevailed over Reinstein's very slight signal coverage advantage. *Id.* at 3175 ¶ 24.

## II. DISCUSSION

### A. Integration -- Quantitative

4. Reinstein, MCC and McMurray each challenge the Board's holding that BCD is entitled to full quantitative credit. However, upon review of the Board's decision and the pleadings, we affirm the Board's analysis and conclusion that an award of full integration credit to BCD is warranted.[3]

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[1] The following pleadings were filed: (a) applications for review filed by Thom Reinstein Communications (Reinstein), Harry S. McMurray (McMurray), and Modesto Communications Corporation (MCC) on June 14, 1993, (b) Opposition to Application for Review filed June 29, 1993 by MCC; (c) Opposition to Application for Review filed June 29, 1993 by Reinstein and (d) Consolidated Opposition of BCD Limited Partnership to Applications for Review filed June 29, 1993. In addition, the following pleadings were filed with the Review Board and forwarded to the Commission for consideration: (a) Petition to Reopen Record, Admit Additional Evidence and Reclose Record filed June 14, 1993 by MCC and (b) Opposition to Petition to Reopen Record filed June 21, 1993 by Reinstein.

[2] McMurray's lack of quantitative integration credit removed him from consideration, and MCC's qualitative enhancements are less significant than those of BCD and Reinstein. See 8 FCC Rcd at 3174 ¶ 22 and 3175 ¶ 24.

[3] Reinstein argues that the Board placed undue weight on the self-serving statement of BCD's limited partner that he prepared the amendment at the request of the general partner. Reinstein argues that the finding is based solely on a declaration by the limited partner upon which there was no opportunity for cross examination. We reject Reinstein's argument. Although the limited partner did not testify at the hearing, the opposing parties had ample opportunity to question Bustos while taking his deposition. Moreover, the general partner was available for cross-examination during the hearing.

**B. Integration -- Qualitative Enhancements**

5. Reinstein argues that the Board, having found BCD's minority ownership showing equal to Reinstein's local residence showing, erred in failing to give additional credit for Reinstein's past residence in the actual community of license and for his civic participation. We disagree. The Board's opinion compares BCD's "minority status factor" with Reinstein's "local residence background factor." *Id.* at 3175 ¶ ¶ 23-24. The Board's use of the phrase "local residence background factor" clearly indicates that it included more than residence in the proposed service area. *Id.* For example, the Board stated that, in addition to the location of the applicant's residence, the Commission " *also* gives considerable weight to an integrated owner's past participation in civic affairs as *part of* his or her *local residence background.*" *Id.* at 3175 ¶ 23 (emphasis added). There is no doubt that the determination of the credit to be awarded an applicant for the local residence enhancement factor includes the consideration of both place of residence and civic activities, if any. See *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965), where civic activities are discussed as part of local residence; see also, *Ronald Sorenson*, 6 FCC Rcd 1952, 1953 ¶ 5 (1991), where local residence and civic activities are considered a single qualitative enhancement factor.

6. Nonetheless, Reinstein cites *Eugene Walton*, 7 FCC Rcd 3237, 3242 (1992) and *Edward F. and Pamela J. Levine*, 8 FCC Rcd 2630, 2633 (Rev. Bd. 1993), rev. den.8 FCC Rcd _____(1993), for the proposition that, although the Commission treats applicants' local residence and civic activities as a unified comparative factor, it considers the enhancement weight to be given for civic participation separately. These cases are of no assistance to Reinstein because they relate to the determination of which applicant was entitled to an advantage for the overall local residence/civic activities factor. In *Eugene Walton*, the Commission ruled that the applicant with long term continuous local residence, even without significant civic participation, was entitled to an advantage over the applicant with shorter local residence and a slight credit for civic activities. *Eugene Walton*, 7 FCC Rcd at 3242 ¶ 12. Rather than undermining the Board's holding in this case, *Eugene Walton* confirms the Board's analysis of civic participation as an element in its overall consideration of the local residence background factor. So too, the holding in *Levine* is not inconsistent with the Board's decision in this case. There, it was determined that, because there were no meaningful distinctions among the applicants under the other integration factors, the comparative weight of the showings for local residence and civic activities had decisional significance. *Levine*, 8 FCC Rcd at 2631 ¶ 4. Although civic activities and local residence were analyzed separately, again, as in *Walton*, the purpose was to determine which applicant would receive an overall advantage under the unified local residence factor. *Id.* at ¶ 11. In the case before us, the Board had no need to quantify Reinstein's separate residence and civic showings because there were no other applicants making serious claims to preference under the local residence background factor. Nonetheless, the Board's award of an advantage to Reinstein under the local residence background factor, after taking into account the proposal of BCD's sole general partner to move to Modesto, was clearly based on Reinstein's six-year Modesto (proposed city of license) residence and his pre- and post-filing civic participation. 8 FCC Rcd at 3175 ¶ 24. Thus, there is no merit to Reinstein's claim that the effect of the Board's action in equating BCD's unmatched 100 percent minority advantage with Reinstein's local residence advantage was to negate the value of civic participation and community of license residence.

7. Reinstein also argues that the Board's treatment of BCD's broadcast experience advantage as dispositive was an error because the broadcast experience factor has been held to be of lesser significance than the other qualitative enhancement factors.[4] Although Reinstein's assertion that broadcast experience carries less weight than the other qualitative enhancement factors is accurate, a point acknowledged by the Board, *id.*, Reinstein's conclusion that broadcast experience can never be dispositive in the comparative analysis is wrong. The Board properly held that in close cases, such as this one, even a slight difference in broadcast experience may be decisive. *Id.*; see also, *James and Sharon Deon Sepulveda*, 3 FCC Rcd 9, 10 ¶ 6 (Rev. Bd. 1993) (even a relatively minor difference in broadcast experience can be decisional). Thus, the Board reasonably concluded that, because BCD's minority status and Reinstein's local residence background factors were of equal significance, BCD's superior broadcast experience was dispositive in the award of an integration preference, and Reinstein has offered no argument warranting further consideration.

8. Reinstein also argues that his proposal to serve almost 35 percent[5] more people than BCD should be dispositive. The Board correctly ruled that, because Reinstein's coverage warrants only a very slight advantage, it does not overcome BCD's overall advantage for integration. 8 FCC Rcd at 3175 ¶ 24. Even after crediting Reinstein with 35 percent greater coverage, the result in this case is consistent with the Commission's policy of placing significantly greater importance on an integration preference than on a comparative coverage preference where, as here, the area is already amply served. See *William L. Carroll*, 8 FCC Rcd 814, 814 ¶ 3 (1993) (integration preference clearly outweighs coverage preference where area already receives ample services) and *Naguabo Broadcasting Co.*, 7 FCC Rcd 1696, 1697 ¶ 8 (1992) (even slight integration preference prevails over comparative coverage preference where area already receives ample signals).

9. Reinstein also attempts to minimize BCD's comparative advantage by lumping all of the factors together, claiming that his past residence in Modesto, civic participation, broadcast experience and comparative coverage advantage are clearly superior to BCD's minority credit, slight credit for broadcast experience and proposed future residence. However, such a comparison is inconsistent with Commission policy and precedent. The factors listed by Reinstein are not of equal weight or significance. Minority status,

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[4] Reinstein cites *Joe L. Aldridge*, 6 FCC Rcd 994, 996 (Rev. Bd. 1991), in which the Board stated that even the most outstanding managerial broadcast records have received only slight credit.

[5] The Board's opinion states that Reinstein's proposal would serve 26 percent more people. 8 FCC Rcd at 3175 ¶ 24. Based on the comparative coverage data in the *Initial Decision*, Reinstein's calculation that his proposal would serve 35 percent more people than BCD's proposal is accurate. See 7 FCC Rcd at 3421 ¶ 138 and *Beach Broadcasting Limited Partnership*, 6 FCC Rcd 4485 ¶ 4 (1991).

residence/civic, and broadcast experience are elements of the integration criterion and are indicators of the likelihood of an applicant's continuing knowledge of changing local interests and needs deemed to be of substantial importance. See *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395-96 (1965). Comparative coverage, however, relates to the efficient use of the frequency, a totally separate criterion, and, as noted in paragraph 8, *supra*, one deemed not to be of the same significance as integration under the circumstances of this case. *Id.* at 394. Thus, the Board correctly determined that BCD was entitled to an overall integration preference and then weighed it against Reinstein's very slight coverage advantage and found BCD to be the preferred applicant.

10. Finally, Reinstein submits that the Board's Decision, which it characterizes as elevating the weight of the minority credit to the status of a *per se* decisional factor, reflects a ! preference for a particular class of speakers with a particular category of views and thus raises serious First Amendment questions. Reinstein does not argue that minority enhancement credit is unconstitutional in all circumstances, but rather because the Board raised minority credit to the status of a *per se* decisional factor on the facts of this case. However, this contention is contrary to the record before us. As discussed above, the Board weighed all comparative factors carefully and, based on its overall evaluation, determined that BCD is the best applicant. Reinstein has not demonstrated that the minority factor has been treated in this case in any other manner than as one of several factors to be considered in the integration analysis. Thus, no further inquiry into this matter is warranted.

**C. Petition to Reopen Record**

11. MCC requests that the record be reopened to admit a copy of Reinstein's Limited Partnership Agreement and then reclosed. MCC's stated purpose for its request is to complete the record "so that a fully-informed judgment may be rendered as to whether all of the provisions required by the *Ownership Attribution Reconsideration Order* are contained in the Agreement. . . ." Reinstein opposes the petition and submits that MCC received the document it seeks to place in the record on June 8, 1990 pursuant to discovery, that MCC questioned Reinstein about the agreement at a deposition on June 26, 1990, and that MCC questioned both Reinstein and the limited partner concerning the agreement during the hearing.

12. To justify reopening the record after the close of the hearing, the petitioner must demonstrate: (1) that it relies on new or newly discovered evidence not previously available to it; (2) that the new evidence, if proven, would raise a substantial and material question of fact affecting the ultimate outcome of the proceeding; and (3) that there is a substantial likelihood of proving the allegations if the case is remanded for further hearings. See *Eve Ackerman*, 8 FCC Rcd 4205, 4205 ¶ 6 (1993). MCC has had access to the limited partnership agreement it seeks to introduce into evidence since June 8, 1990, had ample opportunity to introduce the document into evidence during the hearing, and did not. Furthermore, the agreement could only bear on Reinstein's quantitative integration credit, which, even if his proposal had been discredited, would not alter the ultimate outcome in light of the other rulings in this case. Consequently, MCC has failed to meet, even marginally, its burden in seeking to reopen the record and its petition will be denied.

13. ACCORDINGLY, IT IS ORDERED That the Petition to Reopen Record, Admit Additional Evidence and Reclose Record filed June 14, 1993, by Modesto Communications Corporation IS DENIED.

14. IT IS FURTHER ORDERED That the Applications for Review filed June 14, 1993 by Thom Reinstein Communications, Harry S. McMurray, and Modesto Communications Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the matter of

Amendment of Part 87 of the Rules
Concerning Requirements for Remote
Communications Outlets and
Radionavigation Land Test Stations

**ORDER**

**Adopted: November 19, 1993; Released: December 10, 1993**

By the Commission:

## I. INTRODUCTION

1. This Order adopts changes to Part 87 of the Commission's Rules, 47 C.F.R. Part 87, concerning the requirements for aeronautical advisory stations (unicoms) located at airports with control tower Remote Communications Outlets (RCOs) and the type acceptance requirements for radionavigation land test stations. This action is a result of a request by the Federal Aviation Administration (FAA)[1] regarding RCOs and inquiries that the Commission has received regarding the type acceptance requirements for radionavigation land test stations.[2] Additionally, this Order makes several minor, editorial amendments to Part 87.

## II. BACKGROUND/DISCUSSION

2. Unicoms are aeronautical radio stations at airports that provide communications service to aircraft. At airports without an FAA control tower or FAA flight service station, unicoms are used extensively to provide information related to the safe and expeditious operation of aircraft, such as weather and runway conditions. RCOs are stations licensed at small airports that do not have control towers but are located near large, FAA-controlled airports. Personnel at an FAA control tower at a large airport use an RCO to provide air traffic services, such as terminal area information and weather information, to pilots using the nearby small airport. Unicoms and RCOs may be licensed for operation at the same airport. Unicoms cannot, however, provide information related to weather or runway conditions during the hours of operation of the RCO.[3]

3. Unicoms at airports without FAA-operated facilities can be licensed for one of several frequencies.[4] A unicom at an airport with an RCO, however, can use only one frequency, 122.950 MHz.[5] The FAA suggests increasing the number of frequencies for unicoms at airports with RCOs to serve the convenience of pilots using unicom stations and to reduce the potential for congestion on the frequency 122.950 MHz around many urban areas. We agree with the FAA and believe that this will improve efficiency of airport operations. Accordingly, we are amending Section 87.217(a) to make additional unicom frequencies available for unicom stations at airports with RCOs.[6]

4. Radionavigation land test stations are used to test aircraft navigation systems. There are two types. An Operational Test Facility (OTF) is installed at a fixed location, typically at the end of a runway, to provide a low power signal that is used by pilots as an operational test of the navigation system prior to take-off. A Maintenance Test Facility (MTF) is a portable station used by aircraft manufacturers and technicians to test and verify the proper operation of navigation equipment when it is installed in airplanes or repaired. The Commission licenses radionavigation land test stations (OTF and MTF) and requires, with some exceptions, that these transmitters be type accepted.[7]

5. We have received several requests for clarification of the type acceptance requirements for MTF stations from the manufacturers of signal generators.[8] They note that new signal generators are capable of generating all of the necessary test signals to verify fully the operation of an aircraft radionavigation system and, thus, meet all of the requirements for an MTF except for type acceptance. Signal generators of this type may either be computer controlled or self-contained. Such signal generators may also be used for other test purposes and are not subject to the Commission's type acceptance procedures or the Commission's Rules for low power devices. *See* Part 15 of the Commission's Rules, 47 C.F.R. Part 15. When used as an MTF, for example, a signal generator is placed near the device being tested, and it is used to emit a signal at low power for a very short period on the desired frequency. Signal generators are not in general required to be type accepted because the potential for harmful interference is low. We wish, however, to remove any ambiguity concerning this point for signal generators used as MTFs by amending Section 87.145(d) to specifically exempt them from type acceptance. They must still, however, be licensed as MTFs.

6. Finally, in our continuing review of Part 87, we have identified a number of rules that need editorial corrections and minor clarifications. For example, the formula for determining the spurious emission limit is misprinted in Section 87.139(d). We are taking this opportunity to implement these needed, minor changes.

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[1] *See* letter from Gerald J. Markey, Manager, Spectrum Engineering Division, Federal Aviation Administration, to Mr. Robert H. McNamara, Private Radio Bureau, Federal Communications Commission (June 16, 1992).

[2] *See*, for example, FAX from John L. Garthwaite, Marconi Instruments, to George Dillon, FCC (March 4, 1992).

[3] *See* Section 87.213(b)(1) of the Commission's Rules, 47 C.F.R. § 87.213(b)(1).

[4] See Section 87.217(a)(2), 47 C.F.R. § 87.217(a)(2).

[5] See Section 87.217(a)(1), 47 C.F.R. § 87.217(a)(1).

[6] There are eight airports at which we have licensed an RCO and a unicom on 122.950 MHz. Those unicoms may remain on 122.950 MHz or, at the option of the licensee, change to another unicom frequency. We will contact each of the eight about this option.

[7] See Section 87.145(a) and (b), 47 C.F.R. § 87.145(a) and (b).

[8] RF Signal generators are used to produce low power test signals at various frequencies including those used for the test and check out of navigation equipment.

### III. CONCLUSION

7. Section 1.412(c) of the Commission's Rules, 47 C.F.R. § 1.412(c), provides that rule changes may be adopted without prior notice where the Commission for good cause finds that notice and comment procedures are unnecessary, so long as the basis for the good cause finding is published with the rule changes. Section 1.412(c) of the Rules reflects the requirements contained in the Administrative Procedure Act (APA), 5 U.S.C. § 553(b)(B).

8. We find that a notice and comment rule making proceeding in this matter is unnecessary. The rule changes are minor and non-controversial and the public is not likely to be interested in them. Therefore we find for good cause that compliance with the notice and comment procedure of the APA is unnecessary. *See* 5 U.S.C. § 553(b)(B). In addition because the amendments will promote increased safety and efficiency in the aviation service, we find good cause to make them effective immediately upon publication in the Federal Register. See 5 U.S.C. § 553(d).

9. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and the Regulatory Flexibility Act and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure or record retention requirements and will not increase burden hours imposed on the public; nor will they have a significant impact on a substantial number of small entities.

### IV. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 303(r), and 332(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 332(a), Part 87 of the Commission's Rules, 47 C.F.R. Part 87, IS AMENDED as set forth in the Appendix below, effective upon publication in the Federal Register.

11. For further information concerning this Order, contact Carol Fox Foelak, Private Radio Bureau, (202) 632-7125.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

### APPENDIX

Title 47 of the Code of Federal Regulations, Part 87, is amended as follows:

**Part 87 -- Aviation Services**

1. The authority citation for Part 87 continues to read as follows:

**AUTHORITY: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.**

2. Section 87.139 is amended by revising paragraph (d) and the table in paragraph (i)(1); and by adding a new sentence at the beginning of paragraph (i) introductory text and a new sentence at the end of paragraph (i)(4) to read as follows:

**§ 87.139 Emission limitations.**

* * * * *

(d) Except for telemetry in the 1435-1535 MHz band, when the frequency is bandwidth for aircraft stations above 30 MHz and all ground stations the attenuation must be at least $43 + 10\log_{10}$ pY dB.

* * * * *

(i) In case of conflict with other provisions of § 87.139, the provisions of this paragraph shall govern for aircraft earth stations. * * *

(i)(1) * * *

| Frequency (MHz) | Attenuation (dB)* |
|---|---|
| .005 - 1559 | 83 or ($65 + 10\log_{10}$ pY), whichever is greater |
| 1559 - 18000 | 55 or ($37 + 10\log_{10}$ pY)**, whichever is greater * * * |

* * * * *

(4) The mask shall be defined by drawing straight lines through the above points.

3. Section 87.145 is amended by revising paragraphs (b) and (c) and adding a new paragraph (5) at the end of paragraph (d) to read as follows:

**§ 87.145 Acceptability of transmitters for licensing.**

* * * * *

(b) Each transmitter must be type accepted for use in these services, except as listed in paragraph (d) of this section. However, aircraft stations which transmit on maritime mobile frequencies must use transmitters type accepted for use in ship stations in accordance with Part 80 of this chapter. Type acceptance under Part 80 of this chapter is not required for aircraft earth stations transmitting on maritime mobile-satellite frequencies. Such stations must be type accepted under Part 87.

(c) Some radio equipment installed on air carrier aircraft must meet the requirements of the Commission and the requirements of the FAA. The FAA requirements may be obtained from the FAA, Aircraft Maintenance Division, 800 Independence Ave., S.W., Washington, DC 20591.

(d) * * *

(5) Signal generators when used as radionavigation land test stations (MTF).

* * * * *

4. Section 87.147 is amended by revising the first sentence of paragraph (b), paragraph (d) introductory text, and the third sentence of paragraph (d)(2) to read as follows:

**§ 87.147 Authorization of equipment.**

* * * * *

(b) ELTs manufactured after October 1, 1988, must meet the output power characteristics contained in paragraph 87.141(i) when tested in accordance with the Signal Enhancement Test contained in Subpart N, Part 2 of this chapter. * * *

* * * * *

(d) An applicant for type acceptance of equipment intended for transmission in any of the frequency bands listed in paragraph (d)(3) of this section must notify the FAA of the filing of a type acceptance application. The letter of notification must be mailed to: FAA, Spectrum Engineering Division, 800 Independence Ave. S.W., Washington, D.C. 20591 no later than the date of filing of the application with the Commission.

* * * * *

(2) * * * If the FAA objects to the application for equipment authorization, it should mail its objection with a showing that the equipment is incompatible with the National Airspace System to: Office of Engineering and Technology -- Laurel Laboratory, Authorization and Evaluation Division, 7435 Oakland Mills Rd., Columbia, MD 21046. * * *

* * * * *

5. Section 87.217 is amended by revising paragraph (a)(1) to read as follows:

**§ 87.217 Frequencies.**

(a) * * *

(1) 122.950 MHz at airports which have a full-time control tower or full-time FAA flight service station.

* * * * *

6. Section 87.303 is amended by revising the fourth sentence of paragraph (d)(1) to read as follows:

**§ 87.303 Frequencies.**

* * * * *

(d)(1) * * * In the 2310-2390 MHz band, the following frequencies may be assigned on a coequal basis for telemetering and associated telecommand operations in fully operational or expendable and re-usable launch vehicles whether or not such operations involve flight testing: 2312.5, 2332.5, 2352.5, 2364.5, 2370.5 and 2382.5 MHz. * * *

* * * * *

7. Section 87.471 is amended by revising paragraph (b) to read as follows:

**§ 87.471 Scope of service.**

* * * * *

(b) Radionavigation land test stations are used for the testing and calibration of aircraft navigational aids and associated equipment. When used as radionavigation land test stations (MTF) signal generators must be licensed as radionavigation land test stations (MTF). Transmission must be limited to cases when radiation is necessary and there is no alternative.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 3, 1993

## GTE PETITIONS FOR LIMITED WAIVER OF THE FRESH LOOK POLICY CC DOCKET NO. 91-141

### Pleading Cycle Established

**COMMENTS: December 17, 1993**
**REPLY: December 27, 1993**

On November 16, 1993, GTE Service Corporation (GTE), on behalf of the GTE Telephone Operating Companies and GTE System Telephone Companies, filed a petition for waiver requesting one aspect of the "fresh look" policy set forth in the Commission's Second Memorandum Opinion and Order on Reconsideration in CC Docket No. 91-141, 8 FCC Rcd 7341 (released September 2, 1993). The fresh look policy requires, among other things, the filing of a tariff transmittal whenever expanded interconnection becomes operational in an end office.

GTE's waiver seeks to implement an alternative which it states would reduce administrative burdens for both GTE and the Commission staff and still provide the mandated fresh look rights. It proposes to revise its tariff to permit all customers discontinuing DS-1 or DS-3 agreements with a term of three years or more that were entered into on or prior to September 17, 1992 to receive the benefit of the reduced termination liability offered in the Commission's fresh look policy. Pursuant to GTE's request customers would be permitted to exercise fresh look rights throughout the period of their term agreements. GTE also seeks a waiver to permit it to calculate the termination liability charge without an interest factor.

Interested parties wishing to file comments or oppositions to this petition are invited to do so no later than **December 17, 1993.** Parties filing replies may do so no later than **December 27, 1993.**

An original and five copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's duplicating contractor, International Transcription Services (ITS), Suite 140, 2100 M Street, N.W., Washington, D.C. 20037. Also, one copy shall be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Copies of this petition and other related documents may be obtained from ITS. The document is also available for public inspection and copying in Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Request of

KFI, Inc.

For Declaratory Ruling

**STAFF RULING**

**Adopted: November 18, 1993; Released: December 9, 1993**

By the Chief, Fairness/Political Programming Branch:

1. The Commission has before it a request for a declaratory ruling filed March 18, 1992, by KFI, Inc. ("KFI"),[1] seeking a Commission determination that the news interview segments on "The Bill Press Show"("Press") and "The Hugh Hewitt Show"("Hewitt") are exempt from the equal opportunities requirements of Section 315(a) of the Communications Act, as amended.[2] KFI contends that the news interview segments on the above programs satisfy the requirements for a "bona fide news interview" exemption under Section 315(a)(2) of the Act.

2. According to KFI, Press and Hewitt are telephone call-in/talk programs that consist of interviews with guests by the programs' hosts, interspersed with questions from the hosts and comments called in by listeners. KFI states that both programs have a politics-oriented format featuring candidates on a regular basis. KFI further states that guests on these programs have included presidential candidates, candidates for the U.S. Senate, state officials, the Los Angeles County Supervisors and other local officials.

3. KFI asserts that it regularly schedules both of the programs weekly. According to KFI, Press is a four-hour program that has aired Saturdays from 2:00 pm to 6:00 pm since January 1992 and Hewitt is a three-hour program that has aired from 11:00 am to 2:00 pm on Saturdays since 1990.

4. Moreover, KFI asserts that it regularly schedules bona fide news interview segments on both the Press and Hewitt programs.[3] It notes that each program may present interviews with guests on topics which are not necessarily news-related, but asserts that it is not seeking an exemption with respect to those program segments.

5. KFI claims that it retains control over both the Press and Hewitt programs and that it is directly and solely responsible for production of the news interviews included therein. KFI asserts that the topics and questions asked on each program are selected by KFI, the program producer and program host. KFI also asserts that the host of each program has the experience and expertise necessary to control the program's format and questions by listeners in a manner that avoids the advancement of any individual's candidacy. Further, KFI states that it has a standard procedure for screening all listener calls for the KFI programs prior to their broadcast.

6. Finally, KFI asserts that the selection of guests is based on their expertise or potential audience interest, and that they are not chosen in order to advance the candidacy of any particular person or persons.

**DISCUSSION**

7. Section 315(a) of the Communications Act provides that if a licensee permits a legally qualified candidate for public office to "use" (make an appearance by voice or picture controlled, approved, or sponsored by the candidate) a broadcasting station, it must afford equal opportunities to other such candidates for that office. In 1959, Congress, in an effort to encourage increased news coverage of political campaign activity, amended Section 315(a) to exempt from equal opportunities appearances by legally qualified candidates on the following news programs:

> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of a bona fide news event (including but not limited to political conventions and activities incidental thereto).

47 U.S.C. Section 315(a).

8. In determining whether a program qualifies as a "bona fide news interview," the Commission considers the following factors: (1) whether it is regularly scheduled;[4] (2) whether the broadcaster or the program's producers control the program;[5] and (3) whether the broadcaster's decisions on the format, content, and participants are based on its reasonable, good faith journalistic judgment of newsworthiness rather than on an intention to advance any individual's candidacy.[6]

---

[1] KFI is the licensee of radio station KFI(AM), Los Angeles, CA.

[2] KFI also requested the Commission to rule that "The Tom Lykis Show" and "The Barbara Whitesides Show" qualify for the bona fide news interview exemption. These programs, however, are no longer aired on KFI and, as a result, will not be the subject of the present ruling. If the programs are subsequently aired by KFI on a regular basis, the station may request a ruling at that time.

[3] KFI attaches, as Exhibits C and D, examples of guests that have been interviewed on the Press and Hewitt programs' news interviews over the past year. Exhibit E provides examples of the different subjects that have been discussed on several if not all of the KFI programs at issue over the past one-year period (including the two programs not currently under consideration).

[4] *U.S. News and World Report, L.P.*, 2 FCC Rcd 7101 (1987).

[5] *Declaratory Ruling - Bona Fide News Interview Programs*, 7 FCC Rcd 4681 (1992), *appeal filed, TRAC v. FCC*, No. 92-1358 (D.C. Cir. August 12, 1992).

[6] *U.S. News*, 2 FCC Rcd at 7101.

9. Based on the information contained in KFI's request, it appears that the news interview segments of the Press and Hewitt programs are exempt from equal opportunities as bona fide news interviews under Section 315(a)(2) of the Act. First, the programs are regularly scheduled and each program features news interview segments on a regular basis.[7] The Commission has recognized that regularly scheduled programs that do not exclusively address current events but which include bona fide news interviews on a regular basis are eligible for the news interview exemption.[8] Second, according to KFI, the producers of Press and Hewitt retain exclusive control over all aspects of the programs including the questions asked by listeners. Third, KFI maintains that decisions regarding the news interview segments' format, content, and participants are based upon the producers' bona fide news judgment, with no intent to advance or harm the candidacy of any individual.

10. In view of the foregoing considerations, we believe that to the extent KFI regularly produces bona fide news interviews on "The Bill Press Show" and "The Hugh Hewitt Show," such program segments containing bona fide news interviews are exempt from Section 315(a) of the Communications Act, and accordingly, KFI's instant request as specified above IS GRANTED.

11. Staff action is taken here pursuant to delegated authority.

FEDERAL COMMUNICATIONS COMMISSION

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

[7] *See Aspen Institute*, 55 FCC Rcd 697, 709 (1975)(regularly scheduled meant to Congress a program which a licensee or network initiates and schedules for regular, recurrent broadcast ....)

[8] *Multimedia Entertainment, Inc*, 56 RR 2d 143 (1984).

DA 93 - 1434

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Amendment of Section 73.202(b), | ) | MM Docket No. 93-276 |
| Table of Allotments, | ) | RM-8353 |
| FM Broadcast Stations. | ) | |
| (Franklinton, Louisiana) | ) | |

ERRATUM

Released: November 26, 1993

The Notice of Proposed Rulemaking released on November 3, 1993, concerning the above-captioned proceeding is corrected to extend the comment date from December 27, 1993 to January 10, 1994, and the reply comment from January 11, 1994 to January 25, 1994.

FEDERAL COMMUNICATIONS COMMISSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Amendment of Section 73.202(b), | ) | MM Docket No. 93-274 |
| Table of Allotments, | ) | RM-8372 |
| FM Broadcast Stations. | ) | |
| (Ely, Nevada) | ) | |

ERRATUM

Released: November 26, 1993

The Notice of Proposed Rulemaking released on November 3, 1993, concerning the above-captioned proceeding is corrected to extend the comment date from December 27, 1993 to January 10, 1994, and the reply comment from January 11, 1994 to January 25, 1994.

FEDERAL COMMUNICATIONS COMMISSION

FCC 93-456

Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

| | | |
|---|---|---|
| In the matter of | ) | |
| | ) | |
| Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 | ) | MM Docket No. 92-264 |
| | ) | |
| Horizontal and Vertical Ownership Limits | ) | |

**SECOND REPORT AND ORDER**

Adopted: September 23, 1993 Released: October 22, 1993

By the Commission: Commissioner Barrett issuing a statement.

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## I. INTRODUCTION

1. In this Second Report and Order ("Report and Order"), the Commission implements Section 11(c)(2) of the Cable Television Consumer Protection and Competition Act of 1992[1] by prescribing national subscriber limits and limits on the number of channels that can be occupied on a cable system by a video programmer in which the cable operator has an attributable interest ("channel occupancy limits"). The Commission declines at this time to impose limits on the degree to which multichannel video programming distributors may engage in the creation or production of video programming as authorized by Section 11(c)(2)(C) of the 1992 Act.[2]

2. We previously issued a Notice of Proposed Rule Making and Notice of Inquiry in this proceeding which sought comment generally on the objectives and scope of Section 11(c)(2) of the 1992 Cable Act.[3] The Notice also asked commenters to address various issues regarding the level at which subscriber limits and channel occupancy limits would be reasonable and the appropriate implementation of such limits. In addition, the Commission questioned whether it was necessary or appropriate to adopt limits on the degree to which multichannel video programming distributors ("multichannel distributors") should be permitted to participate in the creation or production of video programming.

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[1] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("Cable Act of 1992" or "1992 Cable Act").

[2] 47 U.S.C. § 533(f)(1)(C).

[3] Notice of Proposed Rule Making and Notice of Inquiry, 8 FCC Rcd 210 (1992)("Notice"). A list of commenters responding to the Notice is provided in Appendix A. These comments were extensively summarized in the Report and Order and Further Notice of Proposed Rule Making ("Further Notice").

The Commission subsequently issued a Report and Order and Further Notice of Proposed Rule Making[4] ("Further Notice"), which sought further comment on specific proposals regarding the adoption and implementation of subscriber limits and channel occupancy limits.

3. In summary, this Report and Order contains the following determinations. The Commission establishes a 30% limit on the number of homes passed nationwide that any one entity can reach through cable systems in which such entity has an attributable interest. Horizontal ownership will be determined for this purpose based on the same criteria used by the Commission in the broadcast context. In addition, to promote a diversity of views the Commission will permit ownership of additional cable systems, up to 35% of homes passed nationwide, provided such systems are minority-controlled. However, in view of the recent federal district court decision holding that the Commission's statutory authority to adopt horizontal ownership limits is unconstitutional, and to avoid potential confusion and uncertainty during the period of judicial review the Commission is staying the effective date of the horizontal ownership rules until final judicial resolution of the District Court's decision.[5]

4. With respect to vertical ownership limits, the Commission adopts a 40% limit on the number of channels that can be occupied on a vertically integrated cable system by video programmers in which the cable operator has an attributable interest. In order to promote a diversity of views the Commission will allow carriage of vertically integrated programming services on two additional channels, or up to 45% of a system's channel capacity, whichever is greater, provided such video programming services are minority-controlled. Vertical attribution is defined for this purpose by reference to the Commission's broadcast attribution criteria. The channel occupancy limits will apply only up to 75 channels. Channel capacity beyond 75 channels will not be subject to vertical ownership restrictions at the present time.

5. The Commission further concludes that in view of the

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[4] Report and Order and Further Notice of Proposed Rule Making in MM Docket No. 92-264, FCC 93-332, released July 23, 1993, ("Further Notice"). A list of commenters responding to the Further Notice and the references to specific commenters used herein is provided in Appendix B.

[5] See Daniels Cablevision v. United States, No. 92-2292 (D.D.C. released September 16, 1993). The vertical ownership limits adopted pursuant to Section 11, which were upheld by the Court are not stayed and will become effective as set forth in para. 109 infra.

structural and behavioral restrictions already required under the 1992 Act, additional restrictions on the ability of multichannel distributors to engage in the creation or production of video programming are unwarranted at the present. The Commission believes that at the present time the objectives of such a restriction are fully addressed by the vertical and horizontal ownership limits required by Section 11, as well as by the carriage agreement and program access provisions contained in Section 12, and Section 19 of the 1992 Cable Act.

## II. BACKGROUND

6. The 1992 Cable Act and its legislative history demonstrate Congress' concern regarding horizontal concentration and vertical integration in the cable television industry. The vertical and horizontal limits required by Section 11 of the 1992 Cable Act are intended to address these concerns. In particular, Congress sought to prevent large, vertically integrated cable systems from creating barriers to entry for new programmers and from causing a reduction in the number of media voices available to consumers. In addition, the 1992 Cable Act was intended to curb the ability and the incentive of cable operators to favor their affiliated video programmers over unaffiliated or competing video programming services. Congress also sought to restrict the degree to which vertically integrated program suppliers favor their affiliated cable operators over unaffiliated cable operators and other program distributors.[6]

7. In adopting Section 11 of the 1992 Cable Act, Congress also recognized that certain benefits derive from vertical integration and horizontal concentration. For example, the House Report acknowledges that vertical relationships promote program diversity and make the creation of new and innovative programming services possible.[7] Further, the House Report suggests that vertical relationships may be an efficient way of financing new programming services and compensating cable operators for assuming some of the risk associated with the launch of new cable programming services.[8] With respect to horizontal concentration, the House Report recognized that consolidation in the cable industry has benefited consumers by allowing efficiencies in the administration, distribution, and procurement of programming. The House Committee also noted that horizontal concentration may help promote the introduction of new services into an increasingly competitive programming market by providing capital

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[6] Cable Act of 1992, Section 2.

[7] House Report at 41.

[8] Id.

and a ready subscriber base for such new services.[9] The House Report concluded that large multiple system operators ("MSOs") are able to take risks that small operators are not, and that such MSOs provide a large enough subscriber base to facilitate new program entry.[10] The Senate Report similarly acknowledged that horizontal concentration may reduce programmers' transaction costs by eliminating the need for negotiation with individual local cable systems across the country.[11]

8. Recognizing these conflicting factors, Congress directed the Commission to consider and balance the following public interest objectives in establishing the ownership limits mandated by Section 11: (A) to ensure that no cable operator or group of cable operators can unfairly impede the flow of video programming from the programmer to the consumer; (B) to ensure that cable operators do not favor affiliated video programmers in determining carriage and do not unreasonably restrict the flow of video programming of affiliated video programmers to other video distributors; (C) to take account of the market structure, ownership patterns, and other relationships of the cable industry, including the market power of the local franchise, joint ownership of cable systems and video programmers, and the various types of non-equity controlling interests; (D) to take into account any efficiencies and other benefits that might be gained through increased ownership or control; (E) to make rules and regulations that reflect the dynamic nature of the communications marketplace; (F) to impose no limitations that prevent cable operators from serving previously unserved rural areas; and (G) to impose no limitations that will impair the development of diverse and high quality programming.[12]

## III. SUBSCRIBER LIMITS

### A. Background.

9. Section 11 of the 1992 Cable Act amends Section 613 of the Communications Act to require the Commission to prescribe regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person or in which such person has an attributable

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[9] Id. at 43.

[10] Id.

[11] Senate Report at 33.

[12] 47 U.S.C. § 533(f)(2).

interest.[13] The adoption of such ownership limits was meant to address Congress' concerns regarding increasing horizontal concentration in the cable industry.

10. Horizontal concentration in this context is based on the share of subscribers served by individual cable companies through their ownership or control of local cable systems. According to information provided to Congress, the top five firms serve almost half of the nation's cable subscribers. Congress concluded that this degree of concentration, though low relative to other industries, may enable some MSOs to exercise excessive market power, or monopsony power, in the program acquisition market.[14] Congress was concerned in particular with preventing large vertically integrated cable systems from creating barriers to entry for new video programmers, and from causing a reduction in the number of media voices available to consumers.[15]

11. Although under traditional antitrust analysis the cable industry is relatively unconcentrated, the 1992 Cable Act requires the Commission to establish limits on horizontal concentration.[16] The Conference Report is silent regarding what shall constitute reasonable limits for this purpose. The House Report, however, indicates that antitrust analysis should not be the sole measure of concentration in the cable industry.[17] The House Report suggests that diversity of information sources can

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[13] 47 U.S.C. § 533(f)(1)(A).

[14] House Report at 42-43.

[15] 1992 Cable Act, Section 2(a)(4).

[16] Under the two prevailing measures of market concentration -- the four firm concentration ratio ("Four Firm Ratio") and the Hirfindahl-Hirschman Index ("HHI"), the cable industry is not concentrated. The Four Firm Ratio measures the percentage of the market captured by the four largest companies in the market. The HHI reflects the distribution of market share among all firms in a given market, giving proportionately greater weight to the market shares of the larger firms. A market is generally considered concentrated when one firm, or a small group of firms, has a sufficient share of the market to exercise power over it. The Justice Department considers an industry concentrated when the HHI exceeds 1800 (although an HHI that exceeds 1000 prompts further evaluation) or when the four firm ratio exceeds 50%. According to the House Report, the HHI for the top 20 MSOs is 491 and the Four Firm ratio for the largest MSOs is 36%, well below the Justice Department's threshold. See House Report at 42.

[17] House Report at 42.

only be assured by imposing limits on the ownership of media outlets that are substantially below those that traditional antitrust analysis would support.

12. The Commission's own analysis regarding horizontal concentration also concluded that the cable industry has become increasingly concentrated. In its 1990 Report to Congress, the Commission noted that in 1989 the two largest MSOs together served almost 34% of all cable subscribers nationwide, and that the top 10 cable companies served 32.9 million of the nation's 53 million subscribers.[18] We indicated that this degree of concentration among companies that frequently do not face local competition raised "the question of whether MSOs (particularly the largest MSOs) have attained sufficient market power to extract unreasonable concessions from program suppliers and to unfairly restrain competition from alternative distribution services."[19] The Commission also indicated that, on the local level, relatively few cable operators face competition from other multichannel video distributors for either programming or subscribers.[20] The Commission concluded that it was this level of local concentration that provided MSOs with the potential to take anti-competitive action against video programming services and competing multichannel providers.[21]

13. On the other hand, the Commission indicated in its 1990 Cable Report that consolidation in the cable industry produced significant benefits and efficiencies to consumers.[22] We noted that higher concentration levels enabled cable companies to take advantage of economies of scale and foster investment in more and better original programming and a wealth of viewing options for consumers. Further, the Commission found that the growth of MSOs had produced significant efficiencies in administration, distribution and procurement of programming which can promote the introduction of new video programming services.[23] Congress similarly found that such benefits and efficiencies result from increased concentration and instructed the Commission to strike a balance between such benefits and the potential for anti-competitive conduct in determining the appropriate level at

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[18] Report in MM Docket No. 89-600, 5 FCC Rcd 4962, 5005 (1990) ("1990 Cable Report").

[19] Id. at 5003.

[20] Id. at 5004.

[21] Id. at 5006.

[22] Id. at 5009.

[23] Id.

which to establish subscriber limits.[24]

**B. Applicable Market.**

14. Further Notice. In the Further Notice, we proposed to adopt exclusively national subscriber limits and asked commenters to indicate whether national subscriber limits would suffice to implement the objectives of the 1992 Cable Act. With respect to regional limits, we tentatively concluded that the benefits of regional concentration outweigh the potential anti-competitive harm that such concentration may have on the local advertising and programming marketplace. Commenters were asked to address this tentative conclusion.

15. Comments. The majority of commenters addressing this issue favor adoption of exclusively national subscriber limits. Several commenters argue that the 1992 Cable Act does not require or even authorize the Commission to promulgate regional subscriber limits. Moreover, commenters indicate that national limits best serve the objectives of the 1992 Cable Act since most programming distribution occurs on a national, not a regional, basis. These parties add that regional limits would threaten the marketplace efficiencies afforded by regional concentration and would impede the incentive of cable operators to invest in fiberoptic and digital compression technologies that will greatly improve cable service and expand channel capacity. Only INTV supports imposing regional subscriber limits, arguing that such limits are necessary to curb the anti-competitive power of MSOs in local advertising markets.[25] However, numerous commenters respond that there is no evidence that cable operators possess market power in the local advertising or program acquisition markets. These commenters contend that in fact, no such evidence exists because the power of cable operators in these markets continues to lag behind local broadcast stations.[26]

16. Discussion. While we disagree with commenters who

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[24] House Report at 43; Senate Report at 33.

[25] INTV contends that in markets with only one cable operator, that operator is the conduit for all local advertising and therefore is in the position to dictate local advertising prices, which places other local media (e.g., TV stations) at a considerable disadvantage. INTV Initial Comments at 7-8. In response, cable commenters argue INTV's assertions are disingenuous since data shows that broadcast stations continue to control an overwhelming share of the local advertising market as compared to cable interests. See TCI Initial Reply Comments at 19-20; NCTA Initial Reply Comments at 12-13.

[26] See NCTA Comments at 4-6; Time Warner Comments at 5.

assert that the Commission is without authority to adopt regional subscriber limits, we decline to adopt such limits at this time. The Senate Report indicates that even prior to the passage of the 1992 Cable Act the Commission had the necessary authority to adopt horizontal limits at the regional level if it found that such restrictions were warranted.[27] Nevertheless, based on the record in this proceeding and on our interpretation of the 1992 Cable Act, we are persuaded that Congress was primarily concerned with national concentration in the cable industry. While the Senate Report indicates that horizontal concentration "at the regional and national level could present concerns about market power," the Report goes on to say that the FCC is required to establish horizontal ownership limits in order to "address the issue of national concentration in the cable industry."[28] Moreover, Congress' objectives in requiring horizontal ownership limits -- to prevent the "concentration of the media in the hands of a few" and to limit the ability of MSOs to exercise undue market power in the program acquisition market -- can best be served by the adoption of national subscriber limits. Issues of regional concentration we believe would be better addressed by other provisions of the 1992 Act designed to promote the introduction of competition to established cable franchises.

17. In addition, we find no basis in the record at this point for imposing regional limits that could reduce investment in the development of regional programming, upgraded cable infrastructure and improved customer service. We believe that the potential benefits and efficiencies of regional concentration outweigh any anti-competitive affects in the local programming or advertising marketplace. In fact, the record suggests that cable operators do not possess undue power in the local programming or advertising markets where they face competition from local broadcast stations and other multichannel program distributors. In the absence of record evidence suggesting that any cable operator possesses undue power in the local programming or advertising market, we conclude that it is unnecessary to adopt regional limits at this time.

**C. Measurement and Percentage Limitation.**

18. Further Notice. The Further Notice proposed to establish subscriber limits as a share of homes passed and sought comment on that proposal. We further proposed to adopt a 25%

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[27] The Senate Report states that "[a]lthough the FCC has the authority to impose horizontal limitations on the cable industry (both national and regional) it has not done so." Senate Report at 34.

[28] Senate Report at 32-34.

limit on the number of homes passed by cable systems owned by any one entity, although we continued to seek comment on a limit in the range of 20% to 35% of homes passed. We also asked commenters to indicate whether it would be appropriate in calculating compliance with the subscriber limits to subtract the number of homes passed by cable systems where effective competition -- as defined in the 1992 Cable Act -- is established. Finally, we asked commenters to address our proposal to allow ownership of additional cable systems, beyond the specified limit, provided such systems are minority-controlled.

19. Comments. All commenters responding to the Further Notice favor measuring the audience reach of cable systems by a homes passed standard rather than a subscriber-based standard.[29] Most commenters agree that a homes passed standard is more appropriate because a measure based on the number of subscribers is relatively unstable and may have the effect of discouraging subscriber growth.

20. On the issue of establishing a reasonable limit on horizontal concentration, cable commenters continue to advocate a subscriber limit of approximately 30% to 40% of homes passed nationwide.[30] These commenters argue that the record does not support the Commission's proposal to adopt a 25% ownership limit. In addition, these commenters assert that in the absence of empirical evidence that existing levels of concentration afford cable operators undue power in the programming market, the Commission should establish subscriber limits significantly above 25%. NCTA, TCI and Time Warner also support allowing additional investments in cable systems beyond the proposed limit provided

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[29] See NCTA Comments at 9; Liberty Media Initial Comments at 32; NATOA Comments at 14; Discovery Comments at 8-9; MPAA Comments at 2; INTV Initial Comments at 4; TCI Initial Comments at 28-29. Time Warner continues to advocate its earlier proposal that horizontal limits should be measured as fraction which has (a) as its numerator, the number of cable subscribers served by a particular cable operator; and that has (b) as its denominator, the sum of (i) the number of all cable subscribers nationwide and (ii) the number of subscribers served by other multichannel video programming distributors. However, Time Warner concurs with the Commission's proposal to measure horizontal ownership as a share of homes passed nationwide. Time Warner Comments at 9-10.

[30] See Liberty Media Comments at 9; NCTA Comments at 7-8; TCI Comments at 13-17; Time Warner Comments at 7-8; Discovery Initial Comments at 9.

such cable systems are minority-controlled.[31] TCI suggests that all investments in minority-controlled cable systems should be exempt in order to encourage MSOs to invest in a large number of minority-controlled cable systems. According to these commenters, such ownership incentives will increase minority ownership of cable systems and promote programming diversity.

21. Cable commenters contend that the record indicates that cable systems with a 30% to 40% share could not preclude the launch or success of new video programming services and that establishing ownership limits below this level will impede the development of new cable technologies. Moreover, cable commenters rely on antitrust principles to argue that MSOs must have at least a 50% market share in order to be regarded as having market power. Cable commenters further assert that the program access, must carry, leased access and rate regulation provisions of the 1992 Cable Act already prevent the abuses Congress was concerned might result from excessive horizontal concentration and therefore the structural limits imposed by subscriber limits need not be overly restrictive. Finally, cable commenters contend that adoption of a 25% limit will stifle investment in new cable programming and the development of new technologies because cable operators will not have adequate advertising revenues and subscriber fees to reinvest.

22. In support of their position that a 30% to 40% subscriber limit is reasonable, cable commenters add that extensive subscriber penetration is not essential to the success of a new programming network. Time Warner, TCI and NCTA observe that many cable programming services have flourished at subscriber penetration levels well below 60%.[32] Therefore, these commenters contend that there is no basis on which to conclude that an MSO with a 30% to 40% market share can impede the success of new video programming services.

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[31] See NCTA Comments at 9; TCI Comments at 18; Time Warner Comments at 7-8.

[32] These commenters note that program networks such as Black Entertainment Television, The Learning Channel, Bravo and Court TV have had achieved success with penetration levels of less than 30% to 40%. See Time Warner Comments at 7-8; TCI Comments at 17; NCTA Comments at 7. In addition, Time Warner notes that The Family Channel, which was launched in 1977 achieved less than 10% penetration of all cable homes by its second year of operation, achieved only 22.1% in its third year, but approached 60% penetration by its sixth year of carriage. Another example provided by Time Warner is Nickelodeon, which achieved only 15.1% penetration in its second year of operation and now enjoys over 90% penetration. Time Warner Initial Comments at 27-28.

23. In contrast to the cable commenters, MPAA continues to advocate a 25% subscriber limit. MPAA argues that a limit of 25% of homes passed is reasonable because it does not require divestiture and would in fact allow most cable operators to expand. MPAA also contends that there are no compelling public interest factors which support a subscriber limit higher than 25%. MPAA asserts that higher levels of concentration are not necessary to induce cable operators to invest in the development of advanced cable technologies, and cites numerous examples of cable companies, with subscriber levels below six percent, who have committed to major investments in the deployment of advanced cable technologies.[33] NATOA similarly supports the 25% limit proposed in the Further Notice, arguing that any higher limit would be inadequate to serve Congress' objectives and would allow cable operators to preclude the success of new or competing video programming services by denying them access to an adequate subscriber base to develop the necessary level of viewership.[34]

24. Discussion. The language of Section 11(C)(2)(A) speaks of establishing limits on "the number of cable subscribers" any one person can reach through cable systems owned by such person. We believe that the term "reach" can be reasonably construed to mean the share of homes passed by a cable operator. Such a measure necessarily encompasses all potential cable subscribers and constitutes a more stable basis on which to impose horizontal limits. Moreover, this interpretation would more adequately reflect a cable operator's potential reach, by encompassing all of the cable homes to which a particular cable operator controls access.[35]

25. In adopting ownership limits we seek to balance two competing concerns raised by Congress: on the one hand, the possibility that large horizontally integrated MSOs might have the ability to preclude the launch of new video programming services and on the other hand, the benefits and efficiencies that result from greater horizontal concentration.[36] Based on our consideration of these statutory factors and on the preponderance of the data provided in the record, we conclude

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[33] See MPAA Comments at 3.

[34] See NATOA Comments at 13-14.

[35] The Commission similarly employs a homes passed measure to implement the revised network/cable cross-ownership restrictions. See Second Report and Order in MM Docket No. 82-434 (Elimination of Prohibition on Network Cable Cross-Ownership) 7 FCC Rcd 1 (1992).

[36] See para. 7 supra.

that a horizontal ownership limit prohibiting any one entity from having an attributable interest in cable systems that in the aggregate reach more than 30% of cable homes passed nationwide strikes the proper balance. A 30% horizontal ownership limit is generally appropriate to prevent the nation's largest MSOs from gaining enhanced leverage from increased horizontal concentration. Nonetheless, it also ensures that the majority of MSOs continue to expand and benefit from the economies of scale necessary to encourage investment in new video programming services and the deployment of advanced cable technologies.

26. We believe that this 30% limit is reasonable to prevent the types of anti-competitive conduct which concerned Congress, particularly when coupled with the behavioral restrictions contained in Sections 12 and 19 of the 1992 Cable Act, which are similarly intended to prevent cable operators from exercising undue power vis-a-vis video programmers and consumers.[37] Moreover, Sections 4 and 5 require cable operators to carry the signals of local commercial and non-commercial broadcast stations. The vertical ownership limits adopted herein and Section 612 of the Communications Act also require cable systems to make a specified percentage of channels available to unaffiliated programmers, which ensures that a diversity of views are presented to cable subscribers. The cumulative effect of these regulations coupled with a horizontal ownership limit of 30% should protect against any one cable system exerting undue power that could prevent the success of new video programming services or "unfairly impede the flow of video programming to the consumer."[38] We also believe that this limit combined with the above mentioned provisions will be appropriate to address the diversity aims which underlie the statutory horizontal ownership provisions. At the same time such a limit will allow the majority of cable operators to expand their system ownership and avail themselves of any efficiencies and other benefits which might be gained through increased ownership or control of cable systems.[39]

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[37] Specifically, the restrictions required by Section 12 are designed to prevent cable operators, as well as other multichannel video program distributors, from requiring a financial interest or exclusive rights in a video programming service as a condition of carriage. In addition, Section 19 of the 1992 Cable Act prohibits vertically integrated cable operators from engaging in unfair or deceptive acts or practices the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing programming to consumers.

[38] 47 U.S.C. § 533(f)(2)(A).

[39] 47 U.S.C. § 533(f)(2)(D).

27. While we proposed a 25% horizontal ownership limit in the Further Notice, we sought comment on a range of 20% to 35%. In concluding that a 30% limit was reasonable we considered a number of factors including the indication in the legislative history of this provision that Congress did not intend necessarily to require the divestiture of any existing interests.[40] In this regard, the Senate Report states that "[t]he legislation does not imply that any existing company must be divested and gives the FCC flexibility to determine what limits are reasonable."[41] Thus, we determined that in the absence of definitive evidence that existing levels of ownership are sufficient to impede the entry of new video programmers or have an adverse affect on diversity, existing arrangements should not be disrupted. Based on our review and consideration of the record, we are persuaded that such divestiture is unnecessary. There is ample support in the record for a limit of at least 30%. Moreover, we believe that a 30% limit in conjunction with other provisions of the 1992 Cable Act is reasonable to prevent cable operators from creating barriers to the entry of new video programmers without unduly restricting their ability to reach their desired audience. Such a limit will also enable cable operators to avail themselves of the benefits and efficiencies of horizontal concentration and may provide an incentive for MSO investment in upgraded technology and infrastructure.

28. As we proposed in the Further Notice, in order to encourage a diversity of viewpoints we will allow ownership of additional cable systems reaching up to 35% of cable homes passed, provided such additional cable systems are minority-controlled. The Commission has long supported increased minority participation and ownership in the cable industry, believing that such minority ownership is a significant means of fostering the

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[40] We note in this regard that the largest existing MSO, TCI, using the attribution standards adopted herein, has an interest in cable systems passing approximately 23.8 million homes or 27% of homes passed nationwide. See TCI submission dated September 22, 1993. This number is larger than the number used for corporate and other reporting requirements because, inter alia, it includes systems in which an "attributable interest" is held rather than systems that are treated as "consolidated for certain corporate and other reporting purposes. Compare, Television Digest, June 7, 1993, p. 4 (TCI and consolidated subsidiaries in which the ownership interest is greater than 50% as of December 31, 1992, pass 17.7 million homes).

[41] Senate Report at 34.

inclusion of a diversity of views in cable programming.[42] We are convinced that the minority ownership incentive we adopt today in connection with the horizontal ownership limits will be an important means of furthering this goal by encouraging MSO investment in minority-owned cable systems, which in turn will promote additional minority ownership of cable facilities and greater minority participation in the selection of programming. We believe that the increased diversity that this additional minority ownership will encourage outweighs the marginal impact on competition that could result from the increased concentration. Notably, we provide a similar incentive in the broadcast context to increase the diversity of programming.[43]

29. We decline to calculate compliance with the national subscriber limits by subtracting the number of homes passed by cable systems in areas where effective competition is established. The statutory provisions and the implementing rules we are adopting focus on ensuring that system operators are constrained in terms of the total share of the market they may occupy in order that no single operator exerts an undue influence, particularly at the national level, on the diversity of programming services available through cable television. The presence of competition in particular markets ameliorates some of the concerns involved and provides members of the public in those markets with the opportunity, through the competitor they select, to influence directly the services offered in those markets. The presence of effective competition in any given system or group of systems does not, however, directly respond to Congress' concern about the exercise of undue control by a single entity at the national level.

**D. Horizontal Attribution Standard.**

30. Further Notice. In the Further Notice we proposed to adopt the broadcast attribution standard to implement horizontal ownership limits and asked commenters to indicate whether this standard was appropriate. We indicated that since these same attribution criteria are used to implement the broadcast multiple ownership rules and cable cross-ownership rules, which have similar objectives, it would appear that they are also appropriate in the context of cable subscriber limits.

31. Comments. Cable commenters generally advocate an

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[42] See Policy Statement on Minority Ownership of Cable Television Facilities, 52 RR 2d 1469, 1471 (1982)(expanding Commission's tax certificate policy to include sales and exchanges of cable television facilities in order to encourage minority ownership of cable facilities).

[43] See 47 C.F.R. § 73.3555(e)(1).

attribution standard based on actual control which they contend is more appropriate in determining the ability of a cable operator to control the programming decisions of a particular system.[44] While these commenters recognize that control may be exerted by less than a majority interest, they nevertheless assert that 5% is far too low a standard. NCTA advocates a 20% attribution threshold and Time Warner favors a 25% equity threshold.

32. TCI continues to advocate an attribution standard that would (1) exempt ownership interests under 10% ownership; (2) attribute interests of 50% or more; and (3) prorate interests between 10% and 50% based on the number of subscribers served by the system.[45] Generally, TCI and the other cable commenters oppose adoption of the broadcast attribution criteria in this context arguing that such a strict standard is inappropriate because a 5% interest holder is incapable of influencing a cable system's program choices.[46]

33. On the other hand, MPAA, ABC, E! Entertainment, Turner and BET support the use of the broadcast attribution criteria. Specifically, MPAA observes that these criteria have worked well in the broadcast area and were suggested in the legislative history as the appropriate criteria to used in the cable context.[47]

34. Discussion. We believe that the broadcast attribution criteria contained in Section 73.3555 of the Commission's rules are appropriate to implement the horizontal ownership limits.[48]

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[44] See NCTA Comments at 10-11; Time Warner Comments at 13; Liberty Media Initial Comments at 17.

[45] See TCI Comments at 19-24. TCI would also incorporate a single majority shareholder exception as is used in the broadcast context. Id.

[46] See Time Warner Comments at 13. Time Warner also contends that Congress did not intend for the Commission to adopt such a strict attribution standard, noting that the Senate Report that preceded the 1992 Cable Act mentioned the broadcast standard under Section 73.3555 as a possible model for developing attribution criteria. Id.

[47] See MPAA Comments at 6.

[48] For the sake of convenience, the actual rules now being adopted reference the standards set forth in the notes to Section 76.501 of the rules (cable ownership rules). These are derived from and are not substantively different from those generally referred to as the broadcast attribution rules, i.e., Section

Pursuant to these criteria, all voting stock interests of 5% or more are attributable. Non-voting stock interests (including most "preferred" stock classes) are not attributable. There are several exceptions to the presumption of attribution created by the 5% benchmark. Most notably there is a single majority shareholder exception, which provides that minority interests will not be attributed where there is a single 51% shareholder. In addition, the interests of "insulated" limited partners are not attributed.

35. In employing the Section 73.3555 attribution criteria for this purpose, we note that the objectives of the broadcast attribution model are consistent with our goals in establishing ownership standards for subscriber limits. In this regard, the broadcast attribution rules focus on ownership thresholds that enable a broadcast licensee to influence or control management or programming decisions. We believe these same issues are also relevant to addressing the concerns at issue in this proceeding relating to the ability of cable operators to unduly influence the programming marketplace. We also note that the legislative history of the 1992 Cable Act supports the use of the broadcast attribution criteria.[49]

**E. Enforcement.**

36. Further Notice. The Further Notice asked commenters to address how compliance with the subscriber limits should be monitored and enforced. We indicated that since few cable systems were in the proposed range of 20%-35%, a certification process may be appropriate to enforce such limits. We suggested that cable operators reaching 20% of homes passed could be required upon transfer or assignment of a cable system to certify that the transfer or sale of such system would not violate the subscriber limits. Alternatively, we noted that such certification may be unnecessary if the Commission could monitor horizontal concentration by reference to publicly available information. We asked commenters to indicate what sources are publicly available that would enable the Commission to monitor horizontal concentration according to the number of homes passed by the largest cable systems. We also asked commenters to indicate if the Commission should consider waivers of the subscriber limits in appropriate cases and whether the Commission should periodically review the subscriber limits to determine

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73.3555.

[49] See Senate Report at 80. The Senate Report indicates that the Commission should use the attribution criteria set forth in Section 73.3555 (Notes) of our Rules, or such criteria as the Commission deems appropriate in determining ownership under the subscriber limit regulations.

their continuing relevance.

37. Comments. MPAA and most cable commenters support the proposed system of certification to enforce subscriber limits. NCTA and Time Warner, however, indicate that the Commission need not institute a certification process to enforce the subscriber limits since so few companies are near the proposed limits. NCTA suggests that the Commission can readily obtain information regarding the number of cable homes passed using data from Kagan Associates or Cable Television Financial Data, which are relied upon by the industry for subscriber information according to homes passed. Alternatively, TCI and Liberty Media advocate complaint-based enforcement.

38. Time Warner and NCTA also suggest that the Commission should consider waivers in appropriate cases such as for expansion of service into previously unserved rural areas and for de minimis violations (e.g., when commercial circumstances temporarily place an operator over the limits).[50] In addition, MPAA, Time Warner and NCTA favor the Commission's proposal to review the subscriber limits every five years.[51]

39. Discussion. We conclude that in order to enforce most efficiently and effectively the horizontal ownership limits, we should institute a system of certification. Although public information is available from various sources regarding the number of homes passed by the largest cable operators, such sources generally apply different attribution criteria than the Commission has decided to employ. Therefore, we will require entities holding attributable interests in cable systems reaching 20% or more of homes passed nationwide to certify to the Commission, prior to the acquisition of any additional cable systems, that such acquisition will not result in a violation of the horizontal ownership limits adopted herein.[52] Where a transaction will result in a cable operator exceeding the limit, the cable operator must seek either a permanent or temporary waiver from the Commission, which might also include a commitment to divest a sufficient number of systems so as to come into

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[50] See Time Warner Comments at 14; NCTA Comments at 12-13.

[51] See MPAA Comments at 2 & 6-7; Time Warner Comments at 14; NCTA Comments at 13.

[52] We contemplate that the MSO whose aggregate attributable interests in cable systems equals or exceeds 20% of homes passed nationwide will be responsible for filing the requisite certification. Thus, if a system in which TCI holds an attributable interest acquires an additional cable system, TCI will be the party responsible for certifying to the Commission that the transaction will not result in a violation of FCC rules.

compliance with these ownership limits after the acquisition is completed. The Commission will consider waiver requests only in limited circumstances where an acquisition temporarily places a cable operator over the permissible number of subscribers or where an MSO seeks to expand service into an otherwise unserved rural area.

40. Finally, in view of the fact that the cable television industry is so dynamic and fluid, we believe that periodic review of the ownership limits is necessary. As we proposed in the Further Notice, we plan to review the subscriber limits every five years to determine whether such limits are reasonable under the prevailing market conditions and whether such limits continue to serve the objectives for which they were adopted. We regard such periodic review as an important means of addressing Congress' intent that such rules reflect the "dynamic nature of the communications marketplace."[53]

## IV. CHANNEL OCCUPANCY LIMITS

### A. Background

41. Section 11 of the 1992 Cable Act also requires the Commission to establish reasonable limits on the number of cable channels that can be occupied by a video programmer in which a cable operator has an attributable interest.[54] Congress adopted this provision to address its concerns that the cable industry has become increasingly vertically integrated and that as a result cable operators have the ability and the incentive to favor their affiliated programmers over unaffiliated or competing distributors. Vertical integration in this context refers to common ownership of both programming and distribution systems. Such integration, Congress determined, could make it difficult for non-cable affiliated or competing programmers to secure carriage on vertically integrated cable systems.[55] Congress similarly found that vertically integrated program suppliers have the incentive and the ability to favor their affiliated cable operators over unaffiliated operators and program distributors using other technologies.[56]

42. According to the House Report, some vertically integrated MSOs favor video programming services in which they

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[53] 47 U.S.C. § (f)(2)(E)

[54] 47 U.S.C. § 533 (f)(1)(B).

[55] Cable Act of 1992, Section 2 (a)(5).

[56] Id.

have an ownership interest, denying system access to unaffiliated programmers and programmers affiliated with rival MSOs. The House Report also found that such vertically integrated MSOs may discriminate against rival video programming services with regard to price, channel positioning, and promotion.[57] In addition, Congress was concerned that vertical integration limits diversity of cable programming and reduces the number of voices available to the public. In this respect, the Senate Report likens the channel occupancy limits to the Commission's broadcast one-to-a-market rule, which is similarly designed to increase the diversity of voices available to the public.[58]

43. On the other hand, the House Report cites a study by the National Telecommunications and Information Administration ("NTIA"), which concluded that common ownership of cable systems and cable programming services did not appear to affect adversely the supply of cable programming or diversity of viewing choices for cable subscribers.[59] NTIA found that none of the top five MSOs showed a pattern of favoring basic services with which they were affiliated. Congress also acknowledged that significant benefits have resulted from vertical relationships in the cable industry. In particular, the House Report cited C-Span, CNN, Black Entertainment Television, Nickelodeon, and the Discovery Channel as examples of innovative programming that would not have been feasible without the financial support of cable system operators.[60]

44. In the 1990 Cable Report, the Commission also found that the cable industry had become vertically integrated. In this regard, the Commission observed that MSOs had equity interests in 13 of the top 20 national basic cable networks and in 6 of the top 8 pay cable networks.[61] We concluded that vertical integration had accelerated in the cable industry, but that such vertical relationships had increased both the quality and quantity of cable programming services. We found that MSO investment was responsible for the development and survival of several of the most popular video programming services. We also determined that vertical integration among the largest MSOs had

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[57] House Report at 43.

[58] Senate Report at 80. The one-to-a-market rule is contained in Section 73.3555 of the Commission's rules.

[59] House Report at 41, citing Video Program Distribution and Cable Television: Current Policy Issues and Recommendations, NTIA Report 88-223, June 1988, p. 102.

[60] House Report at 41.

[61] Cable Report at 5009.

contributed to program diversity by providing new video programming services with an extensive subscriber base and information regarding viewer tastes and desires for new programming.

45. As with the establishment of horizontal ownership limits, we seek to establish channel occupancy limits which strike the proper balance between competing statutory objectives: to ensure that vertically integrated cable operators do not favor affiliated video programmers, or unfairly impede the flow of video programming to cable subscribers, on the one hand and, on the other, to encourage MSOs to continue to invest in the development of diverse and high quality video programming services.[62] Congress expressly indicated that the Commission should "not impose limitations which would impair the development of diverse and high quality programming."[63]

**B. Application of Channel Occupancy Limits.**

46. Further Notice. In the Further Notice we indicated that the statutory language and legislative history were unclear regarding how Congress intended such channel occupancy limits to be applied. In particular, we noted that we were uncertain whether Congress intended such limits to apply only to video programmers affiliated with the operator of the particular cable system in question or whether such limits were intended to apply to carriage of all cable affiliated video programming on all cable systems. We also questioned whether in calculating a system's channel capacity we should subtract the number of broadcast, PEG and leased access channels.

47. Given the ambiguity, we proposed to apply such limits only to video programmers affiliated with the particular cable operator. We noted that such an interpretation would be consistent with Congress' objectives of increasing diversity and expanding the number of voices available to consumers. Moreover, we observed that such an interpretation would address Congress' goal of reducing the ability and the incentive of cable operators to favor their affiliated video programmers. We also proposed to include all activated channels including broadcast, PEG and leased access channels in calculating system capacity.

48. Comments. Cable commenters assert that the statutory language and the purpose of the legislation make clear that Congress intended for such limits to apply only to video programming services affiliated with the particular cable

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[62] See para. 7 supra.

[63] 47 U.S.C. § 533 (f)(2)(G).

operator.[64] According to these parties, cable operators have no incentive to favor a video programmer affiliated with a rival MSO. Nor do they have the ability to influence the programming content of such unaffiliated video programming services. Several commenters also assert that the establishment of channel occupancy limits raises serious First Amendment concerns that will be exacerbated by an unnecessarily broad application of such limits to carriage of all affiliated video programming services on all cable systems.[65]

49. Most commenters also agree that the Commission should take into account all activated channels, including all broadcast, PEG and leased access channels, in calculating system capacity.[66] These commenters note that such channels provide unaffiliated and diverse programming that is competitive with affiliated programming. According to cable commenters, subtracting broadcast, PEG, and leased access channels is unwarranted as a policy matter and would penalize cable operators who carry the broadest array of broadcast, PEG and leased access channels by reducing the channel base available for carriage of affiliated video programming services.

50. In contrast, NATOA contends that the FCC should subtract all broadcast, PEG and leased access channels in

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[64] See NCTA at Comments 13-14; Turner Comments at 6; Cablevision Systems Initial Comments at 10; TCI Initial Comments at 35-36; Time Warner Initial Comments at 45-48; IFE Initial Comments at 7-9; Liberty Media Comments at 13; E! Entertainment Initial Comments at 7; Discovery Comments at 5; and Viacom Comments at 7-8; CIC/CC Initial Comments at 35-37. Commenters cite to language in the Conference Report stating that the Commission shall adopt reasonable limits on the "number of channels that can be occupied by a programmer that is owned by a cable operator or in which the cable operator has an attributable interest." Conference Report at 81 (emphasis added).

[65] See Time Warner Initial Comments at 2; Turner Comments at 4; Viacom Initial Comments at 2-3; NCTA Initial Comments at 24; TCI Initial Comments at 29; CIC/CC Initial Comments at 35; Cablevision Systems Initial Comments at 9-10; Liberty Media Initial Comments at 12, n.5.

[66] See NCTA Comments at 14; Turner Comments at 5; Viacom Comments at 5-8; Time Warner Initial Comments at 41-42; Discovery Comments at 6; CIC/CC Initial Comments at 39-40; Liberty Media Comments at 13-14; MPAA Comments at 9.

calculating channel capacity.[67] NATOA maintains that the legislative history indicates that Congress intended such channels to be subtracted prior to application of the channel occupancy limits.[68] NATOA also notes that adherence to this procedure would yield more channel capacity for unaffiliated programmers.[69]

51. Discussion. Section 11(c)(2)(B) requires the Commission to "establish reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest."[70] The language contained in Section 11(c)(2)(B) of the 1992 Cable Act is not entirely clear because it can also be read as applying to carriage of video programmers affiliated with the particular cable operator or to carriage of any vertically integrated cable programmer on any cable system. However, the Conference Report specifies that such limits shall apply to "the number of channels that can be occupied by a video programmer that is owned by a cable operator or in which the operator has an attributable interest."[71]

52. We thus agree with the majority of commenters who assert that the most logical interpretation of the statutory language is to apply such limits only to video programmers that

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[67] See NATOA Comments at 21. See also INTV Initial Comments at 11;

[68] The Senate Report states in relevant part that

> "The intent of this provision is to place reasonable limits on the number of channels that can be occupied by each MSO's programming services. For example, the FCC may conclude that each MSO should control no more than 20 percent of the channels on any cable system, with a minimum of 6 channels being permissible. The FCC should establish these rules based on the number of activated channels less the numbers of over-the-air broadcast signals carried and the number of public, educational and governmental and leased access channels carried. On a system with 54 channels, 14 of which are occupied by over-the-air signals or access channels, the limit then would be eight channels that could be occupied by programming owned by an MSO . . . . " Senate Report at 80.

[69] See NATOA Comments at 7.

[70] 47 U.S.C. § 533(f)(1)(B) (emphasis added).

[71] Conference Report at 81 (emphasis added).

are vertically integrated with the particular cable operator in question. We believe that this represents the most reasoned approach given Congress' stated objective of encouraging a diversity of voices and preventing unaffiliated programmers from being denied carriage on vertically integrated cable systems.

53. We agree that cable operators have very little incentive to favor video programming services that are affiliated solely with a rival MSO. Moreover, a vertically integrated cable operator appears to have significantly less power to control the content or distribution of a programing service in which it has no ownership interest. Further, we believe that application of the channel occupancy limits to all vertically integrated programmers, regardless of whether they are affiliated with the particular cable operator, would severely inhibit MSO investment in video programming services, since the mere fact of such MSO investment may restrict carriage of the video programming service on all cable systems. In the absence of significant empirical evidence of existing discriminatory practices, we see no useful purpose in limiting the ability of cable operators to carry programming affiliated with a rival MSO. Such a restriction would be unduly burdensome on MSO investment in cable programming and would be contrary to the purpose of the statute. Moreover, we seek to adopt reasonable carriage limits that will balance both the benefits and concerns associated with vertical integration.

54. With respect to calculating channel capacity, we conclude that all activated channels should be taken into account. We note that cable operators are obligated by the 1992 Cable Act to carry local broadcast and noncommercial educational channels, and are required to reserve channel capacity for lease to unaffiliated programmers. Consequently, we conclude that it would be unreasonable to use such channels to reduce the base of channels available for carriage of vertically integrated programing. We believe that the such an approach would penalize cable operators who carry the broadest array of broadcast channels by decreasing the number of channels available for carriage of vertically integrated programing. In addition, we note that there is precedent for including all channels in the calculation of channel capacity in the must carry and leased access provisions of the Communications Act, which take into account all activated channels in determining a cable operator's carriage obligations.[72] Moreover, carriage of broadcast, PEG and leased access channels promotes diversity and provides alternative sources of unaffiliated programming to cable subscribers in furtherance of the statutory objectives. In this regard, we disagree with NATOA's argument that the legislative history requires that the Commission subtract all broadcast, PEG

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[72] 47 U.S.C. §§ 532, 534.

and leased access channels prior to application of the channel occupancy limits. The Senate Report language relied upon by NATOA appears to be included merely as an example to illustrate how the Commission may decide to calculate channel occupancy limits and therefore does not prohibit the Commission from adopting an alternative approach if it finds such an approach to be reasonable to promote the legislative objectives. In any event, this language is not included in the statute itself.

55. Finally, we address the arguments advanced by some commenters that the channel occupancy provisions of the 1992 Act violate the First Amendment. At the outset, it should be noted that the Commission has an obligation to execute and enforce the provisions of Section 11 enacted by Congress and therefore is not free to declare an act of Congress unconstitutional.[73] Nevertheless, we believe that the statute is constitutional. We note that Congress, in enacting the cable access provisions under the Cable Communications Policy Act of 1984, P.L. 98-549, and the cable must carry obligations under the 1992 Cable Act, carefully considered the First Amendment rights of cable operators and others and concluded that these provisions were constitutionally permissible as consistent with and in furtherance of the goals of the First Amendment.[74] We believe that the channel occupancy limits provided in Section 11 are generally analogous to the cable access and must carry provisions and, similarly, do not believe that these limits infringe the First Amendment rights of cable operators or others. Moreover, we note that the federal district court in Daniels Cablevision, Inc. v. United States, which struck down the subscriber limit authority in Section 11, upheld other provisions of the 1992 Cable Act in dispute, including the Section 11 channel occupancy limits, as "facially compatible with the First Amendment."[75]

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[73] See Johnson v. Robinson, 415 U.S. 361, 368 (1974) and Meredith Corp. v. FCC, 255 U.S. App. D.C. 22, 31 (D.C. Cir. 1987).

[74] See H.R. Rep. No. 934, 98th Cong., 2d Sess. at 31-36 (1984) and H.R. Rep. No. 628, 102d Cong., 2d Sess. 58-67 (1992). Indeed, although subject to further review by the U.S. Supreme Court, the cable must carry provisions of the 1992 Act were recently upheld as constitutional as against First Amendment challenges by cable operators and others. Turner Broadcasting System, Inc. v. FCC, 819 F. Supp. 32 (D.D.C. 1993)(three-judge court).

[75] The Court in Daniels Cablevision, Inc. said that "the channel occupancy limits appear unrelated to content" but added:

> Whether or not the regulations ultimately promulgated by the Commission will pass constitutional muster under

C. **Vertical Ownership Attribution Standard.**

56. Further Notice. The Further Notice proposed to employ the broadcast attribution criteria for purposes of determining vertical integration in the context of channel occupancy limits. Commenters were asked whether these criteria were appropriate or whether a higher attribution standard would be appropriate to encourage continued MSO investment in cable programming. We also asked commenters to indicate whether a higher equity threshold should be adopted where more than one MSO holds a non-controlling interest in a video programming service.

57. Comments. Commenters addressing this issue propose a variety of vertical integration standards. NCTA and most cable commenters favor an ownership criteria based on control, which they define as either majority voting control or the ability to elect a majority of the board of directors.[76] Discovery argues that if integration is defined as less than control, the regulations should include a behavioral exception which, if satisfied, would exempt affiliated video programming service from attribution.[77]

58. MPAA proposes an attribution threshold of 15% (combined with a lower channel occupancy limit) to implement Section 11. MPAA notes that this standard differs from the attribution criteria they recommend in connection with subscriber limits. However, they believe that such a distinction is warranted by marketplace circumstances. In this regard, MPAA observes that it is common for a large number of cable operators to each take a minority position in a programmer, thus spreading control more widely among operators. According to MPAA, such participation by a number of different MSOs warrants a higher attribution level than is applied in cable system ownership, where one MSO generally controls management and operations decisions, including

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O'Brien/Ward is, of course, at this point unclear.

Slip op. at 13. We believe the specific regulations adopted here would meet the O'Brien/Ward test. See United States v. O'Brien, 391 U.S. 367 (1968) and Ward v. Rock Against Racism, 491 U.S. 781 (1989).

[76] See NCTA Comments at 18-19; Time Warner Comments at 31-32; Discovery Initial Comments at 19; CIC/CC Initial Comments at 38; Liberty Media Comments at 18-19; Viewer's Choice Comments at 5; IFE Initial Comments at 10.

[77] See Discovery Initial Comments at 19-20.

program selection.[78]

59. TCI suggests a vertical integration criteria, pursuant to which ownership interests below 10% would not be attributable; ownership interests above 50% would be fully attributable; and ownership interests between 10% and 50% would be attributable on a prorated basis. TCI contends that this proposal embodies a clear, workable criteria that is superior to proposals favoring ad hoc disputes over the presence or absence of "control."[79]

60. E! Entertainment, ABC, BET, Turner and GTE, on the other hand, support the Commission's proposal to use the Section 73.3555 broadcast attribution standards.[80] GTE argues that the Commission should establish a uniform attribution criteria in this dynamic period of convergence of communications technologies. Turner similarly maintains that the Commission should not apply a more restrictive attribution standard than currently applies to broadcasters.[81]

61. Discussion. Section 11(c)(2)(B) of the 1992 Cable Act does not indicate the appropriate criteria for determining vertical ownership attribution. The Senate Report, however, suggests that in determining what is an attributable interest, the Committee intended that the Commission use the attribution rules set forth in Section 73.3555 (Notes) of the Commission's rules or such other criteria as the Commission deems appropriate.[82] We conclude that the broadcast attribution criteria are appropriate for this purpose.

62. In the context of establishing limits on vertical integration in the cable industry we are concerned with identifying interests in cable programming services that are sufficient to afford influence or control over programming decisions. We also seek to identify interests that might potentially provide cable operators with an incentive to favor an affiliated video programming service over an unaffiliated or

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[78] See MPAA Comments at 7.

[79] See TCI Comments at 19-24.

[80] See ABC Comments at 4; Turner Comments at 5-6; and GTE Comments at 3-5; BET Comments at 4-5; E! Entertainment Comments at 4-6. Alternatively, Rainbow Programming proposes a 10% attribution threshold, which it says will make no material difference in a cable operators ability to influence or control a video programmer. See Rainbow Comments at 5.

[81] See Turner Comments at 5.

[82] Senate Report at 80.

competing video programming service. However, we must balance these concerns with the objective of preserving the benefits and efficiencies of vertical integration and encouraging continued MSO investment in new video programming services. The broadcast attribution criteria are appropriate to address these competing concerns. The Section 73.3555 attribution criteria were designed to identify all interests that could potentially afford influence or control over management or programming decisions, while providing exceptions for interests above 5% if there is no realistic possibility of such interests imparting control. Thus, we conclude that the broadcast attribution criteria are strict enough to identify all interests that afford the potential to exert influence or control over management or programming decisions, yet flexible enough to permit continued MSO investment in new video programming services. Moreover, we believe that interests of 5% or greater may be substantial enough to motivate cable to systems to favor an affiliated programmer over a programmer in which the cable system has no attributable interest.

63. We decline to adopt a higher attribution threshold where more than one MSO holds a noncontrolling interest in a video programming service. Although we recognize that common ownership of a programming service by several MSOs may decrease the ability of any one MSO to assert influence or control over programming decisions, we nonetheless continue to believe that such minority interests may be sufficient to provide cable operators with an incentive to favor an affiliated video programming service over an unaffiliated service.

**D. Percentage Limitation.**

64. Further Notice. In the Further Notice we proposed a 40% limit on the number of channels that could be occupied by affiliated video programmers. Commenters were asked to indicate whether such a limit would be reasonable and would encourage MSOs to continue to invest in new video programming services. We noted that our intention was to establish a channel occupancy limit that would maximize the number of voices available to cable viewers without impairing the ability or incentive of cable operators to invest in new and existing video programming services.

65. Comments. NCTA and most cable commenters indicate that 40% is a minimally acceptable level at which to establish channel occupancy limits. Most cable commenters argue that the channel occupancy limits must be set high enough to preserve the benefits of vertical integration. In this regard, Discovery and Viacom suggest that a channel occupancy limit of 50% would be reasonable. Given the strict attribution standard proposed by the Commission most cable commenters emphasize that it is essential that the Commission adopt a high enough channel

occupancy limit to avoid impeding program investment and distribution. In addition, several commenters endorse the Commission's proposal to allow carriage of additional vertically integrated video programmers provided such video programmers are minority controlled.[83] These commenters agree that such an ownership incentive will increase minority ownership and promote program diversity.

66. TCI supports the proposed 40% limit but continues to advocate that rather than counting channels, the FCC should implement a system based on bandwidth. According to TCI, such an approach would be more precise and adaptable in the forthcoming era of digital compression. Under TCI's recommended approach, channel occupancy limits would be calculated by counting each 6 MHz segment as a single unit and applying limits on the number of units that could be occupied by vertically integrated programming. TCI submits that such an approach will encourage cable operators to continue to invest in the development of new technologies and innovative program services. TCI's proposal is supported by several other cable commenters.[84]

67. MPAA, NATOA and CFA, on the other hand, favor a 20% channel occupancy limit, stating that such a limit would reduce the risk of MSOs favoring affiliated programmers without inhibiting program investment. MPAA asserts that their proposed attribution threshold of 15% combined with a 20% channel occupancy limit better serves Congress' objectives of encouraging MSO investment in new video programming services, while increasing the channel capacity available to unaffiliated video programmers. MPAA suggests that the Commission's proposed 40% limit could result in many instances in no channels being available to unaffiliated programmers.[85]

68. Discussion. We conclude that a 40% limit on the

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[83] See NATOA Comments at 10; BET Comments at 2-4; TCI Comments at 32; Turner Comments at 6; E! Entertainment Comments at 5; NCTA Comments at 22.

[84] See Time Warner Comments at 23-25; Turner Comments at 4; Liberty Media Initial Comments at 15-16.

[85] According to MPAA, it would be possible under the Commission's proposed 40% limit for a substantial number of 36 channel TCI systems to comply with the proposed rule while carrying no unaffiliated programming networks. MPAA adds that a 54 channel TCI system could comply with the proposed rule by "carrying as few as five unaffiliated programming networks." MPAA Comments at 7-8 (emphasis in original).

number of channels[86] that can be occupied by affiliated video programming services is reasonable to serve Congress' competing objectives in requiring such restrictions.[87] We believe that a 40% limit is appropriate to balance the goals of increasing diversity and reducing the incentive and ability of vertically integrated cable operators to favor their affiliated programming, with the benefits and efficiencies associated with vertical integration.[88] Congress and the Commission have both recognized that there are benefits which result from vertical integration. First, MSO investment has produced a wealth of high quality cable programming services. Many of the most popular cable programming services were initiated or sustained with the help of MSO

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[86] We will measure the vertical ownership limits on a per channel basis, using the traditional 6MHz per channel definition. However, given the dynamic state of cable technology, we recognize that it may soon be common for cable operators to provide several channels using a single 6MHz bandwidth segment. Accordingly, as with our other rules we intend to review periodically this definition, and if necessary to make adjustments to ensure that it is consistent with the current state of technology.

[87] In order to calculate the exact number of channels on a vertically integrated cable system that can be devoted to carriage of programming in which the cable operator has an attributable interest parties should round up or down to the nearest decimal point. For example, on a system with 34-36 channels, 14 channels could be occupied by affiliated video programming services and on a system with 54-56 channels, 22 could be devoted to the carriage of affiliated programming services. In addition, where a single channel is shared by affiliated and unaffiliated video programming services, such channel will be counted as an affiliated channel only if the affiliated programming service accounts for 50% or more of the channel's programming time.

[88] We disagree with MPAA's assertion that a 40% limit could result in many instances in no channels being made available to unaffiliated video programmers. First, MPAA's calculation does not take into account the availability of leased access channels to unaffiliated video programmers. Second, MPAA appears to assume that TCI owned systems will drop popular unaffiliated programming services such as ESPN, USA Network and A&E in favor of other less popular affiliated programming services. The record evidence suggests that such conduct is fairly unlikely. See TCI Reply Comments at 13; Time Warner Reply Comments at 14. Finally, MPAA fails to acknowledge that cable systems carrying the maximum number of broadcast must carry and PEG stations are devoting substantial capacity to the carriage of unaffiliated programming.

investment. Second, vertical integration between cable operators and video programming services appears to produce efficiencies in the distribution, marketing, and purchase of programming.[89] Third, vertical integration can reduce programming costs, which in turn may reduce subscriber fees and cable rates. Fourth, vertical integration may in certain circumstances foster investment in more innovative and riskier video programming services.

69. Moreover, Congress directed the Commission not to adopt limitations "which would impair the development of diverse and high quality video programming."[90] In this regard, we note that cable operators are already required to reserve a substantial percentage of their channel capacity for carriage of local broadcast and PEG stations.[91] In addition, cable operators are subject to leased access requirements, pursuant to which they may be required to designate an additional 15% of their activated channel capacity for commercial use by programmers unaffiliated with the cable operator.[92] Significantly, the leased access obligations are parallel in purpose to the channel occupancy requirements, since they also obligate cable operators to provide system access to unaffiliated video programmers. Thus, cable operators' ability to carry affiliated programming is already significantly curtailed by statutorily mandated carriage obligations.

70. We also note that channel occupancy limits are not the only means by which Congress intended to prevent anti-competitive conduct by vertically integrated MSOs. Sections 12 and 19 of the 1992 Cable Act establish specific behavioral restrictions prohibiting discrimination by vertically integrated cable operators and video programming services. As we indicated above, these provisions impose more narrowly tailored behavioral restraints, specifically prohibiting anti-competitive conduct by vertically integrated cable operators and programmers, while channel occupancy limits impose broader structural constraints, which affect the ability of all cable operators to carry programming in which they have an attributable interest. In addition, the must carry, leased access and PEG requirements imposed by other provisions of the Communications Act help to ensure that a diversity of views is available to cable

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[89] See Besen Study (attached to TCI Comments) at 23-24.

[90] 47 U.S.C. § 533 (f)(2)(G).

[91] Cable operators with more than 12 channels may be required to reserve 33% of their activated channel capacity for local broadcast and PEG channels. See 47 U.S.C. §§ 531, 534, 535.

[92] 47 U.S.C. § 532.

subscribers. In light of the foregoing, we believe that the channel occupancy limits need not be unduly restrictive in order to prevent the incentive and the ability of cable operators to favor their affiliated programmers or to promote a diversity of views to cable subscribers.

71. In addition, in order to promote the presentation of a diversity of viewpoints on cable we will allow carriage of vertically integrated video programming services, on two additional channels or up to 45% of a cable system's channel capacity, which ever is greater, provided such additional video programming services are minority-controlled. As we indicated above with respect to horizontal ownership limits, the Commission has long recognized that the public interest is enhanced when cable programming reflects a diversity of viewpoints.[93] We believe that allowing such expanded carriage of minority-controlled video programming services will encourage additional MSO investment in minority-owned programming services, which will in turn promote minority ownership of video programing services and increase the diversity of viewpoints presented to cable subscribers. In this regard, we believe that the diversity benefits of such increased minority ownership outweigh the access concerns associated with such an increase in integration. We decline, however, to adopt a similar policy for minority oriented-programming. Although we seek to encourage the presentation of a diversity of viewpoints on cable television including those of minorities, we believe that increasing minority ownership of cable systems and video programming services is the most effective and legally sound means of promoting such diversity.[94]

**E. Treatment of Pay Channels, Multiplexed Channels and Local and Regional Networks.**

72. Further Notice. In the Further Notice we proposed to count all vertically integrated pay-per-view, pay-per-channel and multiplexed services against a system's channel occupancy limits. We proposed, however, to exempt local and regional programming networks from such limits in order to encourage the development of more local cable programming.

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[93] See para 28 supra, citing, Policy Statement on Minority Ownership of Cable Television Facilities, 52 RR 2d 1469 (1982).

[94] See Metro Broadcasting v. FCC, 110 S Ct. 2997, 3019 and n.36 (1990)(noting substantial practical and constitutional difficulties that would be presented by FCC promotion of broadcast program diversity through direct program regulation rather than through structural means such as ownership).

73. Comments. Cable commenters addressing this issue argue that vertically integrated regional networks, pay-per-view, pay-per-channel, and multiplexed channels should be exempt from the channel occupancy limits.[95] According to these commenters, since pay channels are not used by all subscribers, such channels should not be counted against the cable operator's channel occupancy limit.[96] In addition, Viewer's Choice argues that pay-per-view-networks are not vertically integrated video programmers as contemplated under Section 11 of the 1992 Act. Viewer's Choice indicates that pay-per-view networks select programming from a variety of sources to be offered on an "on demand" basis to subscribers. According to Viewer's Choice, the subscriber is actually the programmer in this case and thus, such pay services should be exempt from the channel occupancy requirements.[97]

74. With respect to multiplexed channels, cable commenters argue that cable operators engage in multiplexing only when they have the additional unused capacity to do so, and thus the existence of multiplexed channels suggests that a system operator is already carrying a full array of programming. Encore adds that multiplexing encompasses more than just time shifting. According to Encore, multiplexing generally refers to a much broader concept of counter programming that affords consumers significant benefits warranting an exception from the channel occupancy limits.[98]

75. Several commenters argue that the channel occupancy limits should not apply to local or regional vertically integrated programming networks.[99] These commenters submit that

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[95] See Viewer's Choice Comments at 6-9; NCTA Initial Comments at 31; Liberty Media Initial Comments at 24; Time Warner Comments at 26-27; IFE Initial Comments at 9.

[96] Time Warner asserts that only a fraction of a system's subscribers receive pay-per-view and pay-per-channel services, but cable operators must nonetheless reserve a channel throughout the system to make such services available to subscribers who desire them. Therefore, Time Warner submits that such services should not count against the overall channel occupancy limit. Time Warner Initial Comments at 43-44. See also NCTA Initial Comments at 22-23; Viewer's Choice Comments at 6-9.

[97] Viewer's Choice Comments at 6-9.

[98] See Encore Comments at 7-8.

[99] See Time Warner Comments at 33-34; Cablevision Systems Initial Comments at 12; Viacom Comments at 8-9; ARC Comments at 2-6; TCI Comments at 33-34; Liberty Media Comments at 14; Turner

there is no evidence demonstrating that cable operators favor affiliated regional programming networks over unaffiliated video programming services. Moreover, commenters favoring an exemption for local and regional cable networks maintain that such networks are developed in order to respond to the needs and tastes of local subscribers and that subjecting such networks to channel occupancy limits would discourage MSOs from investing in the development of such services. NATOA, on the other hand, opposes such an exemption for local or regional video programming services unless such services operate on a nonprofit basis. NATOA argues that there is no legitimate public interest objective to be served by exempting vertically integrated local or regional video programming services and that such an exemption would render the channel occupancy limits ineffective.[100] MPAA also opposes an exception for regional programming arguing that the 1992 Cable Act's mandatory carriage provisions address Congress concerns regarding localism.[101]

76. Discussion. We conclude that vertically integrated pay channels and multiplexed channels should not be exempted from the 40% channel occupancy limits. While we recognize that such channels provide subscribers with a valuable service and increase the diversity of programming available on cable, we see no compelling public interest objective to be served by such an exemption. We also reject the argument advanced by Viewer's Choice that pay-per-view services are not video programmers as contemplated by Section 11 of the 1992 Cable Act. Pay-per-view services are not distinguishable from other programming services for purposes of the ownership rules because they offer a selection of programming from various sources, both affiliated and unaffiliated. This is true of many basic cable programming services. Moreover, the fact that subscribers choose whether or not to view a particular program offered on a pay-per-view basis does not transform the subscriber into the video programmer. Decisions regarding what programming will be offered on a pay-per-view network are generally made by the network's management, as is the case with other video programming services. Accordingly, we believe that such vertically integrated pay services should be counted against the 40% channel occupancy limit.

77. We also disagree with commenters who argue that multiplexed channels should not be counted toward the channel occupancy limits because they provide subscribers with time diversity and counter programming. We recognize that such

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Comments at 7.

[100] NATOA Comments at 10.

[101] See MPAA Comments at 10.

diversity is beneficial to consumers, but we believe that Congress was specifically concerned with ensuring that a diversity of non-vertically integrated programming sources is available to cable subscribers. We do not believe that this diversity objective would be well served by exempting multiplexed channels from the channel occupancy limits. We do recognize, however, that some of these pay and multiplexed services as they develop are likely to occupy channels and subscriber attention in ways that are different from channels historically distributed on basic cable programming service tiers or even on a pay basis. These differences are likely to be increasingly reflected as cable systems expand beyond their traditional channel capacities. Thus, we believe the discussion below regarding the application of channel occupancy limits to higher capacity systems is an appropriate means of addressing some of the concerns raised here with respect to multiplexed and other less traditional services.

78. We have determined , however, to apply channel occupancy limits only to video programming services distributed to cable systems on a nationwide basis. A programming service need not be distributed in every state to be regarded as a national programming service. A programming service that is distributed to cable systems in numerous states across the country or in a variety of regions may also be considered a national programming service. Programming services distributed only to a particular community or to a discrete region will be exempt from such limits.[102] We consider such an exemption for local and regional programming services to be an important means of encouraging continued MSO investment in the development of local cable programming, which is responsive to the needs and tastes of local audiences and serves Congress' objectives of promoting localism.[103] Moreover, we recognize that because local and regional programming services are usually costly to produce and appeal only to a limited population of subscribers, such an exception may be necessary to encourage MSOs to continue investing in such local programming. Without such an exception commenters argue that MSOs will favor national programming services which can be marketed to larger audiences across the

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[102] We decline, however, to follow NATOA's proposal to exempt such services only if they are operated on a non-for- basis. We do not regard such a definition as relevant to the public interest objective of promoting localism.

[103] The 1992 Cable Act states that "A primary objective and benefit of our nation's system of regulation of broadcast television is the local origination of programming." 1992 Cable Act, Section 2(a)(10).

country producing greater subscriber and advertising revenues.[104]

**F. Effect of Fiber Optic Cable and Digital Signal Compression.**

79. Further Notice. The Further Notice indicated that emerging technologies such as digital signal compression and fiber optic cable would expand channel capacity such that channel occupancy limits would eventually be unnecessary to ensure that cable operators did not favor vertically integrated programmers. Accordingly, we asked commenters whether we should establish a threshold beyond which such channel occupancy limits would not apply. We also questioned whether such a cap should be adopted in this proceeding or at some future date. In this regard, we asked commenters to indicate whether there is an identifiable channel capacity threshold associated with the next generation of cable technology which would provide an appropriate level beyond which channel occupancy limits should no longer apply.

80. Comments. NCTA and several cable commenters propose capping the channel occupancy limits at 54 channels,[105] noting that 64% of subscribers receive between 30 and 53 channels, while only 28% receive 54 or more channels. Time Warner and TCI agree that such expanded channel capacity justifies elimination of the channel occupancy limits. According to Time Warner, digital compression and fiber optic cable will afford cable operators the ability to expand channel capacity beyond their ability to develop new programming. Thus, Time Warner asserts that cable operators will be induced to increase their carriage of unaffiliated video programming services making channel occupancy limits unnecessary. Time Warner contends that 75 channels is the maximum channel capacity available using current cable technologies. According to Time Warner, additional channel capacity beyond 75 channel is possible only through the use of advanced technologies such as fiber optic cable or digital signal compression. Thus, Time Warner suggests that 75 channels is an appropriate threshold beyond which channel occupancy limits should no longer apply.

81. Alternatively, Viacom proposes that to encourage implementation of digital compression, the Commission should not

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[104] See TCI Comments at 33; Liberty Media Comments 14-15; Time Warner Comments at 33; Viacom Comments at 8-9; ARC comments 1-8.

[105] See NCTA Comments at 16-17; Viacom Initial Comments at 15-17; Time Warner Initial Comments at 56-58; E! Entertainment Comments at 3; Liberty Media Comments at 16; Discovery Comments at 5-9.

apply channel occupancy limits to any increased channel capacity that results from the use of compression technology. Under Viacom's suggested approach, a system that is able to deliver three channels using the spectrum ordinarily needed to deliver one channel, would be entitled to exempt the two additional channels from the channel occupancy limits.

82. In contrast, CBA, MPAA and NATOA oppose the establishment of a channel occupancy cap at the present time. MPAA asserts that it is too early to know what effect a 500 channel system will have on the need for such limits and suggests that instead the FCC review the caps every five years and make adjustments accordingly. INTV maintains that any additional channel capacity resulting from new technologies should be made available to independently owned video programming services.

83. Discussion. We continue to believe that expanded channel capacity will reduce the need for channel occupancy limits. As we previously indicated in the Further Notice, the expanded channel capacity that will result from fiber optic cable and digital compression technology will help obviate the need for such limits as a means of encouraging cable operators to carry unaffiliated or competing video programming services. Although information on how multichannel video distributors will respond to greatly increased channel capacity is necessarily somewhat speculative, the record indicates that vastly larger cable systems will likely be inclined to deliver targeted "niche" video programming services aimed at correspondingly smaller audience sizes. In addition, pay-per-view and pay-per-channel offerings -- also with more limited audiences -- will increase as channel capacity increases. Also, as channel capacity becomes more abundant and relatively less costly, "multiplexing" is likely to increase and more capacity will be used to increase the convenience of program starting times rather than to distribute separate channels of original programming. Thus, for example, a feature film service ("near-video-on-demand") intended to be competitive with video tape rentals might involve the distribution of films on numerous channels simultaneously with starting times staggered by only a few minutes.

84. Occupancy limits in these circumstances do not parallel occupancy limits for more restricted capacity systems where most services are distributed on discrete channels to a significant portion of a system's subscribership. Accordingly, we believe that occupancy limits can be relaxed, as suggested in the Further Notice, once the number of cable channels on a system increases beyond the number distributed using traditional technology. Conventional cable distribution, in the absence of dual cable distribution plant, signal compression, or "fiber to the block,"

enables the distribution of approximately 75 video channels.[106] At the present time, this threshold appears to be a reasonable cut-off for application of the channel occupancy limit. Thus, we will apply the channel occupancy limits only up to 75 channels on a cable system owned by a vertically integrated MSO.[107] Any additional channel capacity made possible through the use of advanced cable technologies will not be subject to the channel occupancy limits at this time. This limitation will be subject to periodic review along with the other provisions of these rules and will be eliminated if developments warrant.

**G. Effective Competition.**

85. Further Notice. In the Further Notice we observed that once effective competition has been established and a cable operator no longer occupies a program access bottleneck position, channel occupancy limits may no longer be necessary or desirable. Thus, we proposed to phase out channel occupancy limits in communities where effective competition is established. We asked commenters to indicate whether the definition of effective competition for this purpose should include cable systems subscribed to by fewer than 30% of the homes located in the franchise area.

86. Comments. Cable commenters addressing this issue all favored our proposal to phase out channel occupancy restrictions

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[106] Although on a 550 MHz cable system up to 80 channels may technically be offered, cable operators frequently use some channels to provide audio services and system monitoring and control services, thus approximately 75 channels are generally available to provide video programing service. Accordingly, we conclude that a 75 channel threshold is reasonable for this purpose. See Report to Congress Regarding Comparisons Between Cable Systems and Consumer Electronics Equipment ET Docket No. 93-7, Adopted October 5, 1993, Released October 5, 1993 at 26.

[107] The channel occupancy limits need not necessarily apply to the first 75 channels. For example, on a cable system with 75 channels no more than 30 channels (40% of 75) can be devoted to the carriage of affiliated video programming and thus, no less than 45 channels (60% of 75) must be occupied by unaffiliated video programming services. On a system with 100 channels at least 45 channels would still be required to be devoted to the carriage of unaffiliated programming services, however, these 45 channels could be any of the system's 100 channels.

in communities where effective competition has developed.[108] Where effective competition exists, these commenters assert that non-vertically integrated video programmers clearly have alternative outlets for programming. In addition, these commenters indicate that there is no incentive for cable operators to favor their affiliated video programming services over unaffiliated or competing video programming services in a competitive marketplace. According to one cable commenter, maintaining such limits where effective competition is established might hinder competition, by enabling a multichannel video program distributor to carry programming owned by a cable operator that the cable operator would not be permitted to carry.

87. MPAA and NATOA, on the other hand, oppose eliminating channel occupancy limits in communities where effective competition develops. MPAA observes that a competing multichannel distributor may also be vertically integrated and removing channel caps in these instances would result in foreclosure of nonaffiliated programmers from either outlet. Both MPAA and NATOA contend that the effective competition standard relates only to rate regulation and is not relevant to the ability of a vertically integrated cable operator to preclude a video programmer from obtaining access to subscribers.

88. Discussion. We conclude that we should not eliminate channel occupancy limits in communities where effective competition exists. Although it is argued that the development of effective competition will preclude cable operators from exercising undue power in these situations, the effective competition standard was not adopted for this specific purpose and it is not clear that the presence of effective competition for any cable system addresses all of the relevant concerns that Congress expressed in enacting Section 11 of the Act. For example, if a programming service is excluded from carriage on a competitive system for reasons related to vertical integration, that service will continue to be disadvantaged, and the diversity and competition objectives of this portion of the Cable Act will be frustrated. Thus, at this time, we are not prepared to say that the presence of "effective competition" is a reasonable basis for removing the channel occupancy caps.

89. Congress has, however, indicated that a primary objective of the Act was to "rely on the marketplace to the maximum extent feasible, to promote the availability to the public of a diversity of views and information" and that the legislation was intended to protect consumer interests in the

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[108] See NCTA Comments at 24; Liberty Media Comments at 16; Time Warner Comments at 37; TCI Initial Comments at 39; Viacom Initial Comments at 17-18; Turner Comments at 7; Discovery Comments at 5-7.

receipt of cable service "where cable television systems are not subject to effective competition."[109] Thus, as with a number of other aspects of these rules, further analysis as to whether the restrictions might be phased out where effective competition develops will be appropriate as we gain more experience with the rules.

**H. Grandfathering Carriage of Vertically Integrated Programmers.**

90. Further Notice. In the Further Notice, we proposed to grandfather any existing vertical relationships which exceed the channel occupancy limits we ultimately adopt and asked commenters to address this proposal.

91. Comments. Most cable commenters addressing this issue support the Commission's proposal to grandfather existing vertical relationships in order to minimize disruption to established industry arrangements and to prevent subscriber confusion.[110] Viacom observes that deletion of vertically integrated video programming services is unwarranted and would disrupt subscriber service. Moreover, Viacom submits that program deletion would interfere with existing financial arrangements between programmers, operators and advertisers which rely on certain penetration levels and continued carriage of video programming services.

92. Liberty Media argues that the Commission should adopt a flexible approach in grandfathering existing vertical relationships which exceed the new channel occupancy limits. According to Liberty Media, cable operators with grandfathered programming should not be prevented from developing or investing in additional video programming services. Liberty Media adds that in order to avoid penalizing cable operators who already have invested in new video programming services, the Commission should establish special channel occupancy limits for grandfathered systems at levels two or three channels above existing carriage levels.

93. Discussion. We believe that the public interest would be disserved by requiring cable operators to delete vertically integrated video programming services in order to comply with the channel occupancy caps. Accordingly, we will grandfather all vertically integrated video programming services carried as of December 4, 1992 (the effective date of the 1992 Cable Act),

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[109] 1992 Cable Act, Section 2(b).

[110] See NCTA Comments at 21; MPAA Comments at 8-9; Discovery Comments at 6; Turner Comments at 7; Time Warner Comments at 38; Viacom Comments at 9-11; E! Entertainment Initial Comments at 12; Liberty Media Initial Comments at 28-29.

which exceed the channel occupancy limits we adopt herein. We believe that this proposal will minimize the disruption to existing programming relationships and will prevent subscriber confusion, which could result from divestiture or program deletion. We note, however, that once additional capacity becomes available on a grandfathered system, the cable operator shall be prohibited from expanding its carriage of vertically integrated video programming services until such system is in full compliance with the channel occupancy limits.

94. We recognize that grandfathering existing vertical programming relationships to some extent may protect established services and favor the largest and most vertically integrated cable operators. However, we believe that such considerations are outweighed by the need to prevent subscriber confusion and minimize the disruption to existing carriage agreements. Moreover, given the trend toward increased channel capacity as a result of improved cable technologies, it appears that no useful purpose would be served by requiring cable operators to drop existing services. In any event, such an approach appears to be consistent with Congress' intent that the FCC "take particular account of the market structure, ownership patterns, and other relationships in the cable television industry" in establishing such limits.[111]

**I. Enforcement.**

95. Further Notice. In the Further Notice we observed that the 1992 Cable Act and its legislative history were silent on the issue of enforcement of the channel occupancy limits. We proposed to enforce channel occupancy limits through a process of certification whereby cable operators would certify annually to the Commission that their cable systems are in compliance with the channel occupancy limits.

96. Comments. NATOA and CBA advocate local franchise authority enforcement of the channel occupancy limits. NATOA asserts that local enforcement would be most efficient since local authorities are more familiar with their local cable operator and are better able to monitor the local programming line up.[112] CBA agrees that enforcement of the channel occupancy caps should be performed by local franchising authorities.[113] According to CBA, strict enforcement of the channel occupancy limits is essential to induce cable operators to be more responsive to the needs of their local communities and less

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[111] 47 U.S.C. § 533(f)(2)(C).

[112] See NATOA Comments at 4-5.

[113] See CBA Comments at 2.

concerned with the advancement of their own programming investments. CBA indicates that cable operators often refuse carriage to local LPTV stations, claiming an unavailability of channel capacity, yet such cable operators continually increase carriage of vertically integrated video programming services.

97. NCTA, Viacom and Time Warner all oppose local enforcement of the channel occupancy limits.[114] NCTA argues that local authorities do not have the resources or the expertise to determine the ownership structure of various video programming services being offered. NCTA and Time Warner suggest that the FCC should enforce the channel occupancy limits on a complaint only basis. Viacom proposes requiring cable operators to certify compliance with channel occupancy limits to the FCC as part of their annual reporting requirement in connection with rate regulation. Viacom submits that placing the certification burden on the local authorities would be unduly burdensome and would result in inconsistent applications of the attribution rules.

98. Discussion. While we proposed in the Further Notice to rely on a process of certification to monitor compliance with the channel occupancy limits, we have determined that a preferable and less burdensome approach is to require cable operators to maintain records regarding the nature and extent of their attributable interests in all video programming services as well as information regarding their carriage of such vertically integrated video programming services on cable systems in which they also have an attributable interest. Such information should be retained for a period of at least three years in the cable operator's public file.

99. In this regard, we welcome the assistance of local franchise authorities in monitoring compliance with the channel occupancy limits in their franchise area. Where a franchise authority has questions as to whether a local cable operator is in violation of the channel occupancy limits, such franchise authority may request to inspect the cable operator's records at reasonable times and during regular business hours. After such inspection, franchise authorities believing that a violation exists should file a complaint with the Commission. Other parties seeking to report potential violations of the channel occupancy limits may also contact the local franchise authority or report the matter directly to the Commission. If the Commission ultimately finds a cable operator to be in violation of its channel occupancy rules, the Commission may impose appropriate sanctions, including cease and desist orders and forfeitures.

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[114] See NCTA Initial Comments at 35; Viacom Initial Comments at 18-19; Time Warner Initial Comments at 56-60.

## V. LIMITS ON PARTICIPATION IN PROGRAM PRODUCTION

100. Notice. In the Notice we asked commenters to indicate whether there it was necessary or appropriate to adopt additional restrictions on the degree to which multichannel distributors may participate in the creation or production of video programming, given the structural and behavioral restrictions contained in the 1992 Cable Act which are similarly designed to prevent anti-competitive conduct by vertically integrated cable systems and video programming services.

101. Comments. Most commenters addressing the issue of establishing limits on multichannel distributor participation in the creation and production of video programming opposed establishing such limits at this time. Commenters agreed with the Commission's tentative conclusion in the Notice that the objectives of any such restrictions are fully addressed by other provisions of the Act.[115]

102. Discussion. Section 11 of the 1992 Cable Act requires the Commission to consider the necessity and appropriateness of imposing limitations on the degree to which multichannel video programming distributors ("multichannel distributors") may engage in the creation or production of video programming.[116] Congress included this provision in response to the same concerns regarding vertical and horizontal integration discussed above. Thus, in considering whether such limits are necessary or appropriate, we must also consider the degree to which these concerns are already addressed by other provisions of the 1992 Cable Act.

103. As we stated previously in the Notice, the 1992 Act mandates that the Commission establish certain structural limits on the development of horizontal and vertical integration in the cable industry. The subscriber limits and channel occupancy limits that we adopt herein are intended to promote diversity and to encourage competitive dealings between cable programming services and cable operators and between cable programming services and competing video distributors. Channel occupancy limits, in particular, restrict the ability and the incentive for

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[115] See NCTA Initial Comments at 36-37; Viacom Initial Comments at 19-21; Time Warner Initial Comments at 60-62; TCI Initial Comments at 58; Liberty Media Initial Comments at 9-11. The National Private Cable Association, INTV and Liberty Cable indicated that some limits may be necessary. These commenters, however, did not indicate the rationale for such additional restrictions.

[116] 47 U.S.C. § 533 (c)(2)(C).

cable operators to favor programming services in which they have an attributable interest. Such structural limits also limit the ability of cable operators to impede the entry of new programming services.

104. In addition to the structural limits addressed in this proceeding, the 1992 Cable Act establishes certain behavioral restrictions which prohibit anti-competitive conduct by cable operators in the acquisition of programming. Section 12 for example, prohibits cable operators from requiring either exclusive rights or a financial interest in programming services as a condition of carriage. Moreover, Section 12 prohibits cable operators from discriminating against unaffiliated programmers in the selection, terms and conditions of carriage.

105. Section 19 provides additional protection against anti-competitive conduct by vertically integrated cable operators. Section 19 of the 1992 Act prohibits cable operators and programming vendors that are vertically integrated with cable operators from engaging in "unfair" or "deceptive" practices that would hinder competition in cable service and programming or inhibit delivery of programming to consumers. The regulations we adopted pursuant to Section 19 establish effective safeguards to prevent a cable operator with an attributable interest in a programming vendor from discriminating against other multichannel distributors in the price, terms or conditions of sale of such programming or from unreasonably refusing to sell programming to a another multichannel distributor.

106. In view of the structural and behavioral restrictions already required under the 1992 Act, we do not believe that additional restrictions on the ability of multichannel distributors to engage in the creation or production of video programming are warranted at the present time. We conclude that at the present time the objectives of such a restriction are fully addressed by the other provisions of Section 11, Section 12, and Section 19 of the 1992 Cable Act.

## VI. ADMINISTRATIVE MATTERS

### A. Regulatory Flexibility Analysis.

107. The Commission's final regulatory flexibility analysis for the Second Report and Order and the Commission's initial regulatory flexibility analysis for the Further Notice are set forth in Appendix C.

### B. Paperwork Reduction Act Statement

108. The decision in this proceeding has been analyzed with respect to the Paperwork Reduction Act of 1980, and has been

found to impose new and modified requirements or burdens on the public. Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

C. **Ordering Clauses**.

109. Accordingly, IT IS ORDERED that pursuant to the authority contained Sections 2(a), 4(i) and (j) and 303 of the Communications Act of 1934, as amended, and the Cable Television Protection and Competition Act of 1992, Pub. L. No. 102-385, Part 76 of the Commission's Rules, 47 C.F.R. Part 76, Is AMENDED as set forth in Appendix D below, and will become effective January 10, 1994, subject to approval by the Office of Management and Budget. However, the effective date of the horizontal ownership limits contained in Section 76.503 of the Commission's rules IS STAYED pending final judicial resolution of the District Court decision in Daniels Cablevision v. United States, No. 92-2292 (D.D.C. released September 16, 1993) holding such rules unconstitutional.

E. **Additional Information**.

110. For additional information regarding this proceeding, contact Jacqueline Chorney, Mass Media Bureau, (202) 632-6990.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## APPENDIX A

### List of Commenters Responding to the Notice of Proposed Rule Making

Initial Comments

Affiliated Regional Communications, Ltd. ("ARC")
Annenberg School for Communications/University of Southern California
(David Waterman)
The Association of Independent Television Stations, Inc. ("INTV")
BellSouth Telecommunications, Inc. ("BellSouth")
Cablevision Industries Corporation/Comcast Corporation ("CIC/CC")
Cablevision Systems Corporation ("Cablevision Systems")
Cablevision of Texas III, L.P. ("Cablevision of Texas")
Cities of Inverness, Crystal River, et.al. (Joint Florida Cities")
Coalition of Small System Operators ("Small System Coalition")
Cole, Raywid & Braverman ("CR&B")
Community Broadcasters Association ("CBA")
Consumer Federation of America ("CFA")
Continental Cablevision, Inc. ("Continental")
Corporate Partners
Discovery Communications, Inc. ("Discovery")
E! Entertainment Television, Inc. ("E! Entertainment")
GTE
Intermedia Partners
International Family Entertainment ("IFE")
Liberty Cable Company, Inc. ("Liberty Cable")
Liberty Media Corporation ("Liberty Media")
The Motion Picture Association of America ("MPAA")
The National Association of Telecommunication Officers & Advisors, The National League of Cities, The United States Conference of Mayors, and the National Association of Counties (collectively "NATOA")
The National Cable Television Association, Inc. ("NCTA")
The National Private Cable Association, Maxtel Associates Ltd. ("NPCA")
The National Telephone Cooperative Association
Nationwide Communications, Inc. ("NCI")
The New York State Commission on Cable Television ("N.Y. Cable Commission")
Sandler Capital Management ("Sandler")
New Jersey Board of Regulatory Commissioners ("New Jersey Cable Board")
Tele-Communications, Inc. ("TCI")
Three Rural Telephone/Cable Companies
Time Warner Entertainment Company, L.P. ("Time Warner")
Transworld Telecommunications, Inc. ("TTI")
Tribune Regional Programming, Inc. ("TRB")
Turner Broadcasting System, Inc. ("Turner")
Viacom International, Inc. ("Viacom")

Reply Comments
ARC
Bell Atlantic Communications
Cablevision of Texas
Coalition of Small System Operators
Cole, Raywid & Braverman
Discovery
GTE
Liberty Media Corporation
MPAA
NATOA
NCTA
The National Telephone Cooperative Association
Nationwide Communications, Inc.
Oklahoma Western Telephone Company
Satellite Broadcasting Association
TCI
Time Warner
The United States Telephone Association
Viacom

## APPENDIX B

### List of Commenters Responding to the Further Notice of Proposed Rule Making

Comments

Affiliated Regional Communications, Ltd. ("ARC")
Black Entertainment Television ("BET")
Capital Cities/ ABC, Inc. ("ABC")
Community Broadcasters Association ("CBA")
Discovery Communications, Inc. ("Discovery")
E! Entertainment Television, Inc. ("E! Entertainment")
Encore Media Corporation ("Encore")
GTE Services Corporation ("GTE")
Liberty Media Corporation ("Liberty Media")
Pay-Per-View Network, Inc. ("Viewer's Choice")
The Motion Picture Association of America ("MPAA")
The National Association of Telecommunication Officers & Advisors, The National League of Cities, The United States Conference of Mayors, and the National Association of Counties (collectively "NATOA")
Rainbow Programming Holdings, Inc. ("Rainbow Programming")
Satellite Broadcasting Association
The National Cable Television Association, Inc. ("NCTA")
Tele-Communications, Inc. ("TCI")
Time Warner Entertainment Company, L.P. ("Time Warner")
Turner Broadcasting System, Inc. ("Turner")
Viacom International, Inc. ("Viacom")

Reply Comments

ARC
Bell Atlantic Communications
Community Broadcasters Association ("CBA")
Consumer Federation of America ("CFA")
Discovery
E! Entertainment Television, Inc. ("E! Entertainment")
GTE
Liberty Media
MPAA
NATOA
NCTA
Rainbow Programming
Starsight Telecast, Inc. ("Starcast")
TCI
Time Warner
Turner
Viacom
Viewer's Choice

APPENDIX C

**Report and Order -- Final Regulatory Flexibility Analysis**

Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

1. **Need and purpose for this action:** This action is taken to implement the provisions of the Cable Television Consumer Protection and Competition Act of 1992 relating to vertical and horizontal ownership limits.

2. **Summary of issues raised by comments in response to the Initial Regulatory Flexibility Analysis:** No comments were received in response to the request for comments to the Initial Regulatory Flexibility Analysis.

3. **Significant alternatives considered and rejected:** The Commission considered several proposals relating to implementation and enforcement of the vertical and horizontal ownership limits. We analyzed the record in light of our statutory directives and established regulations which, to the extent possible, minimize the burdens on the cable systems and programming services subject to the vertical and horizontal ownership limits.

4. **Federal Rules which overlap, duplicate or conflict with these rules.** None.

Appendix D
Rule Changes

Part 76 of Title 47 of the Code of Federal Regulations is amended to read as follows:

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 533, 535, 542, 543, 552, as amended 106 Stat. 1460.

2. Part 76 is amended by adding Section 76.503 to read as follows:

**§ 76.503 National Subscriber Limits**

* * * * *

(a) Except as set forth in paragraph (b) of this section no person or entity shall be permitted to reach more than 30% of all homes passed nationwide through cable systems owned by such person or entity or in which such person or entity holds an attributable interest.

(b) Ownership of cable systems reaching up to 35% of all homes passed nationwide shall be permitted provided the additional cable systems, beyond 30% of homes passed nationwide, are minority-controlled.

(c) Prior to acquiring additional cable systems any person or entity holding an attributable interest in cable systems reaching 20%, or more, of homes passed nationwide must certify to the Commission that no violation of the national subscriber limits prescribed in this section will occur as a result of such acquisition.

Note 1: For purposes of this Section:

(a) "Minority-Controlled" means more than 50% owned by one or more members of a minority group.

(b) "Minority" means Black, Hispanic, American Indian, Alaska Native, Asian and Pacific Islander.

(c) "Attributable Interest" shall be defined by reference to the criteria set forth in the Notes to § 76.501.

* * * * *

4. Part 76 is amended by adding Section 76.504 to read as follows:

**§ 76.504 Limits on Carriage of Vertically Integrated Programming**

(a) Except as otherwise provided in this section no cable operator shall devote more than 40% of its activated channels to the carriage of national video programming services owned by the cable operator or in which the cable operator has an attributable interest.

(b) The channel occupancy limits set forth in paragraph (a) shall apply only to channel capacity up to 75 channels.

(c) A cable operator may devote two additional channels or up to 45% of its channel capacity, whichever is greater, to the carriage of video programming services owned by the cable operator or in which the cable operator has an attributable interest provided such video programming services are minority-controlled.

(d) Cable operators carrying video programming services owned by the cable operator or in which the cable operator holds an attributable interest in excess of limits set forth in paragraph (a) as of December 4, 1992 shall not be precluded by the restrictions in this section.

(e) Cable operators are required to maintain records in their public file for a period of three years regarding the nature and extent of their attributable interests in all video programming services as well as information regarding their carriage of such vertically integrated video programming services on cable systems in which they also have an attributable interest. These records must be made available to local franchise authorities, the Commission, or members of the public on reasonable notice and during regular business hours.

Note 1: For purposes of this Section:

(a) "Minority-Controlled" means more than 50% owned by one or more members of a minority group.

(b) "Minority" means Black, Hispanic, American Indian, Alaska Native, Asian and Pacific Islander.

(c) "Attributable Interest" shall be defined by reference to the criteria set forth in the Notes to § 76.501.

* * * * *

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

**RE: Implementation of the Cable Television Consumer Protection and Competition Act of 1992 -- Cable Ownership**

This Second Report and Order adopts regulations regarding horizontal ownership and channel occupancy limits. In particular, the Commission establishes (1) a horizontal limit at 30% of homes passed nationally by cable systems owned by any single entity, with an allowance for ownership of systems totalling an additional 5% beyond the horizontal limit provided that such systems are minority controlled; and (2) a 40%-limit for channels occupied by programming services that are vertically integrated with a particular cable operator, applicable up to 75 channels. Regarding the channel occupancy limit, the rules allow for an additional two channels, or 5% of the cable system's total channels, whichever is greater, provided that the services are minority controlled.

I write separately to emphasize the importance of the horizontal and vertical ownership limits as structural measures addressing the aspects of concentration and vertical integration in the multichannel marketplace. In particular, I am concerned that these measures must be viewed the context of the Commission's prior decisions on rate regulation and program access, as well as the rules adopted today concerning program carriage agreements.[1] Given the existing behavioral regulations imposed on vertically integrated cable operators and programming vendors, these cable ownership provisions will become the structural component that will govern the cable industry's transition from a regulated environment to effective competition. In this regard, I believe that greater availability of programming services to all distributors will play a critical role in determining whether the future broadband network will ultimately belong to all multichannel competitors, including cable operators, to the extent that they remain able to invest and exercise creativity. Therefore, I am concerned that the channel occupancy rules must incorporate sufficient flexibility to permit future opportunities for investment leading to the development of new ventures and programming.

I am also interested in the higher thresholds established to allow for ownership and channel occupancy where cable systems and

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[1] See Rate Order and Further Notice of Proposed Rule Making, MM Docket No. 92-266, FCC 93-177, released May 3, 1993; 58 Fed. Reg. 29736. See also First Report and Order, MM Docket No. 92-265, 8 FCC Rcd 3359 (1993); Second Report and Order, MM Docket No. 92-265, adopted September 23, 1993.

programming services are minority controlled. I support these provisions that will promote opportunities for greater participation by minority enterprises in the multichannel marketplace as program vendors and distributors.

Finally, the horizontal ownership provisions are affected by the decision by the United States District court for the District of Columbia regarding the constitutionality of this portion of Section 11 of the 1992 Cable Act.[2] Although the Court has found the statute's numerical limit on subscribers unconstitutional, the decision includes a provision to stay the results pending completion of any proceedings on appeal. Therefore, I am concerned that the Commission will need to monitor the development of this litigation and the ramifications of any further events concerning the effectiveness of the cable ownership rules, especially to the extent that any developments regarding the vertical limits could affect the availability of programming services.

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[2] See Daniels Cablevision v. United States of America, No. 92-2292 [D.D.C., released September 16, 1993].

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION** FCC 93-496
**Washington, D.C. 20554**

| | | |
|---|---|---|
| In the Matter of | ) | |
| Policies and Rules | ) | CC Docket No. 93-292 |
| concerning Toll Fraud | ) | |

**NOTICE OF PROPOSED RULEMAKING**

Adopted: November 10, 1993 Released: December 2, 1993

Comment Date: January 14, 1994
Reply Date: February 10, 1994

By the Commission: Commissioner Barrett issuing a statement.

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## I. INTRODUCTION

1. This Notice of Proposed Rulemaking (NPRM) seeks comment on proposals to: (1) achieve closer coordination between the industry, consumers, vendors, law enforcement agencies, Congress, and the Commission to aid in the detection and prevention of toll fraud; (2) improve consumer education initiatives by the Commission, consumer groups, and the telecommunications industry; (3) determine that tariff liability provisions that fail to recognize an obligation by the carrier to warn customers of toll fraud risks of using carrier services are unreasonable; (4) establish a federal policy assigning liability for payphone fraud; (5) codify a requirement for written warnings for all telecommunications equipment registered under Part 68; and (6) determine measures to prevent cellular and Line Information Database (LIDB) fraud.

## II. BACKGROUND

2. Until the mid 1980s, carrier networks were the main targets of telecommunications fraud. Fraud perpetrators might use electronic devices or even a child's whistle to simulate carrier switching tones that would allow them to place calls and avoid paying for them. As carriers developed new methods to prevent these primitive forms of toll fraud, however, perpetrators began to use computers to access the carriers' networks.

3. Control over the use of telecommunications services has increasingly shifted from carriers to individual consumers. Technology is providing more flexible options for use of those services. With this shift in control, however, has come a shift in the toll fraud targets. Customers, as well as carriers, are now the victims. Fraud involving customer-owned private branch exchanges (PBXs) provides an example. Customers can now use a feature in their on-premises PBX equipment to route incoming remote access calls to an outgoing line. With this capability, a company's sales representative in the field can, for example, have the convenience of placing calls that would be billed to the employer's outgoing PBX line. Fraud perpetrators have discovered that they can call into a PBX and then use computers or "finger hacking" to identify the authorization code for the remote access feature connected to the outgoing line. Once the authorization code is found or "hacked," the perpetrator can obtain a dial tone and make outgoing calls that are billed to the PBX owner. In some cases, the PBX owner may also be billed for incoming 800 calls made by the perpetrator.

4. Both customers and carriers suffer the effects of fraud; industry and Secret Service estimates of annual losses range from one to five billion dollars, in an industry in which annual billings are approximately $175 billion. Several different types

of fraud are creating these losses: the unauthorized remote access through PBXs already described; cellular "cloning," in which billing codes for legitimate cellular subscribers are installed in a perpetrator's cellular phones; the billing of operator-assisted calls to lines with billing restrictions, such as payphone lines; and "clip-on" fraud, in which the perpetrator physically attaches a calling device directly to a phone line. Fraud perpetrators may watch consumers using calling cards at payphones and sell the calling card numbers to others, or directly approach consumers and ask them to accept billing to their phones as part of a spurious "official" investigation. Industry and law enforcement sources expect that new types of fraud will develop even as these existing types of fraud are being combatted.

5. Experience has shown that those new telecommunications technologies offering the most convenience and flexibility for users, are often also most likely to present new toll fraud opportunities. The Commission's goal has been, and will continue to be, to work with consumers and the industry to find solutions to each fraud problem without hindering the development or use of these new technologies. In devising these solutions, we must ensure that telecommunications equipment and services remain accessible.

6. The Commission is not charged with enforcing criminal statutes or prosecuting toll fraud perpetrators.[1] The Department of Justice, local law enforcement agencies, and the U.S. Secret Service are among the agencies charged with the enforcement of criminal statutes. Nevertheless, the Commission has taken several steps toward developing solutions to toll fraud. First, the Commission issued a series of "Consumer Alerts" describing the dangers posed by telecommunications fraud and steps that can be taken to detect and prevent it.[2] Second, on October 9, 1992, we convened an en banc hearing on Toll Fraud.[3] Panelists representing telecommunications consumers, carriers, equipment vendors,

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[1] The Commission's jurisdiction relates to interstate and foreign communications by wire or radio. See 47 USC 152

[2] "Consumer Alert - Toll Fraud," Public Notice released April 19, 1991; "Consumer Alert, Telecommunications Toll Fraud, Second in A Series," Public Notice released June 9, 1992; "Consumer Alert, Toll Fraud Risks During the Year-End Holiday Season, Third in A Series," Public Notice No. 31003, released December 17, 1992; "Consumer Alert - Toll Fraud, Fourth in a Series," released June 15, 1993; "Consumer Alert - Toll Fraud - Impersonators of Investigative Officers, Fifth in A Series," Public Notice released August 3, 1993. Consumer Alerts have been distributed to the industry, trade associations, and the press.

[3] See Public Notice No. 23921, July 9, 1992.

insurance providers, and law enforcement agencies presented diverse perspectives and detailed proposals for detection, prevention, and responsibility.[4] Following the hearing, the Commission encouraged further comment by holding the record on toll fraud open until November 16, 1992.[5] Third, the Commission has taken action in related proceedings to address toll fraud concerns. In July, 1992, in the operator service rulemaking proceedings, the Commission required local exchange carriers to offer services, to reduce payphone providers' and other aggregators' exposure to toll fraud.[6] Earlier, in 1990, the Commission adopted standards for direct inward dial (DID) calls which require answer supervision on DID calls routed back to the public switched network by a PBX. This amendment of Part 68 of the Commission's rules was initiated because carriers were losing tens of millions of dollars of revenue in cases where PBXs failed to return an answer supervision signal to the central office, notifying it of a billable call. The Commission continues to resolve formal and informal complaints that raise toll fraud issues.

7. The Commission also coordinates with industry, consumers, vendors, and law enforcement agencies. Commission staff attends meetings with industry groups working to formulate prospective solutions to toll fraud problems.[7] Some fraud issues appear to have been resolved by the industry, including, for example, dial tone reorigination, which permits the calling party to receive a second dial tone after the original call is terminated. The industry also has implemented intercompany cooperation on live call tracing. Many carriers have recently responded to the widespread concerns about toll fraud by offering services designed to provide early detection and prevention of the problems.

8. It does not appear, however, that private action can resolve all toll fraud problems or that incentives to control fraud

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[4] See Appendix B.

[5] See Public Notice, DA 92-1464, released October 22, 1992; File No. 93-TOLL FRAUD-01; Appendix A.

[6] See Order on Reconsideration, CC Docket No. 91-35, 7 FCC Rcd 4355 (1992).

[7] E.g., the Toll Fraud Prevention Committee, a committee formed under the auspices of the Alliance for Telecommunications Industry Solutions (ATIS), formerly the Exchange Carriers Standards Association (ECSA), in order to identify issues involving toll fraud and develop resolutions for voluntary implementation by the industry; the Communications Fraud Control Association, a non-profit national clearinghouse for toll fraud information and prevention; the United States Secret Service, Electronic Crimes Branch of the Financial Crimes Division.

are structured in the best possible way. For example, the recent Chartways formal complaint proceeding[8] presented the issue of liability for charges associated with unauthorized calls. Chartways, the complainant, was a private branch exchange (PBX) owner. It learned from AT&T that an unusual volume of calls to Pakistan was originating at its PBX. A subsequent investigation revealed that the calls were apparently being routed through the remote access feature of the PBX. Although Chartways informed AT&T that the calls were unauthorized, AT&T maintained that Chartways was liable for the related charges under the general payment obligation of AT&T's tariffs. Chartways responded by filing a formal complaint against AT&T with the Commission. The complaint alleged that AT&T's attempt to collect the charges was unreasonable and discriminatory, thus violating sections 201(b) and 202(a) of the Communications Act.[9] The Common Carrier Bureau denied the complaint,[10] based on a largely stipulated record, and following the same analysis, we denied Chartways' application for review of the Bureau decision.[11] First, we found that the Bureau was correct in determining that the tariff provisions at issue were clear and definite in requiring payment for the calls, in that the tariff provisions recognized no exception to the general payment obligation for unauthorized usage.[12] Next, we affirmed the finding that Chartways had control over the disputed calls.[13] We noted that Chartways had stipulated that it had "the capability to restrict access to and egress from its PBX" at all times. Moreover, while the record contained no evidence that AT&T was negligent in any way with regard to the unauthorized calls, it also showed that Chartways had taken no steps available to it to detect or prevent unauthorized calling through its PBX. Finally, we

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[8] Chartways Technologies, Inc. v. AT&T Communications, Memorandum Opinion and Order, FCC 93-394 (released August 19, 1993). (Chartways).

[9] See 47 U.S.C. §§ 201(b), 202(a).

[10] Chartways Technologies, Inc. v. AT&T Communications, 6 FCC Rcd 2942 (Com.Car.Bur. 1991).

[11] We note that on November 5, 1992, Judge Irving Hill, United States District Court, Central District of California, granted summary judgment to the plaintiff, AT&T, in AT&T v. Pacific Mutual. Specifically, Judge Hill was persuaded by the logic of the Bureau's Chartways decision and found the tariff unambiguous. File No. CV 91-6793-IH (filed 11-5-92); see also AT&T v. Jiffy Lube, United States District Court, File No. K-9-2400 (concurring with Judge Hill and finding AT&T tariff unambiguous).

[12] Chartways, FCC 93-394, paras. 11-13.

[13] Id. at para. 16.

agreed that AT&T's practices in this case were not discriminatory when compared to its liability limits on unauthorized calling card usage because calling card liability is controlled explicitly by a specific federal statute and related regulations.[14]

9. In United Artists, we examined the question of liability for charges associated with unauthorized calls that were either originated or accepted at the complainant's payphones.[15] The threshold issue in the case was whether United Artists was AT&T's "customer," because only a "customer" who "orders" service could be held liable for charges under the terms of AT&T's tariff.[16] We determined that the customer for the operator-assisted calls at issue was the caller or billed party, not United Artists, the owner of the payphones.[17] We also found that United Artists did not presubscribe its payphone lines to AT&T for direct-dialed service.[18] We then looked at whether United Artists had otherwise ordered service from AT&T, stating that if United Artists "had failed to take steps to control unauthorized operator-assisted and direct-dialed calling and had, instead, installed its phones in such a way as to allow callers to charge such calls to [its] payphone lines, [United Artists] could reasonably be held to have constructively 'ordered' service from AT&T, thus establishing an inadvertent carrier-customer relationship."[19] The record showed that United Artists had adopted a number of measures designed to control potentially fraudulent calling.[20] For example, it told the local exchange carrier, New York Telephone (NYT), that its lines were to have no primary interexchange carrier at all. It also ordered originating line and billed number screening services from NYT, which were intended to inform operator service providers such as AT&T of any billing restrictions on those lines.[21] In addition to such preventative steps, United Artists also monitored calling from its phones and regularly reported any apparently fraudulent calling to NYT and AT&T. Based on the record, we

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[14] Id. at paras. 19-20.

[15] United Artists Payphone Corp. v. New York Telephone Co. and American Telephone and Telegraph Co., Memorandum Opinion and Order, FCC 93-387 (released August 18, 1993).

[16] United Artists, FCC 93-387, at para. 5.

[17] Id. at paras. 10-11.

[18] Id. at para. 12.

[19] Id. at para. 13.

[20] Id. at para. 14.

[21] See paragraph 27, infra.

concluded that United Artists did not intentionally or constructively order service from AT&T and therefore could not be held liable as a customer for the disputed charges.[22]

10. Our decision to begin this rulemaking is based upon our experience with complaints and the LIDB investigation;[23] the en banc hearing testimony; public comment solicited pursuant to a petition filed by the Pacific Mutual Life Insurance Company, which, among other things, asked the Commission to establish policies and rules to allocate the costs of unauthorized calls associated with PBX fraud among carriers, customers, and equipment suppliers;[24] and public comment solicited pursuant to a petition filed by the Florida Public Service Commission that asked the Commission to review tariffs relating to toll fraud.[25] The purpose of this rulemaking is to identify additional policies we should establish or steps we should take to avoid, or reduce the risks of, toll fraud.

## III. DISCUSSION

### A. *The En Banc Hearing*

11. Comments. During the En Banc Hearing on Toll Fraud, we heard testimony from eighteen panelists representing communications customers, common carriers, equipment manufacturers, law enforcement agencies, and others. A common theme emphasized by the panelists at the session was that effective approaches now exist to battle toll fraud if customers, carriers, equipment vendors, and law enforcement agencies cooperate to detect and prevent fraud. Included among these potential solutions are equipment-based measures that end-users may take themselves, carrier-based monitoring services, insurance products, law enforcement efforts, and proactive educational programs. The hearing was divided into three panels.[26] The first panel focused on PBX and other customer premises equipment (CPE)-based fraud. Participants included a PBX and CPE owner, a PBX trade association representative, a law enforcement expert, an equipment manufacturer, and a long distance company offering anti-fraud services. The second panel focused on network-based fraud and liability issues. Participants included a hacker expert, a representative of the Toll Fraud Prevention

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[22] Id. at para. 15.

[23] See paragraph 35, infra.

[24] See Public Notice released March 14, 1991.

[25] See Public Notice released April 5, 1993.

[26] See Appendix B.

Committee of the Exchange Carriers Standards Association,[27] a payphone equipment manufacturer, and a panelist discussing network-based validation services. The third panel focused on emerging technical, law enforcement, and business solutions to domestic and international toll fraud. Panelists included a manufacturer of new anti-fraud products, a law enforcement expert on detection and prevention of fraud, a toll fraud expert from a Canadian telecommunications corporation, a panelist discussing negotiation of international fraud disputes, and representatives of interexchange carriers, and an insurance company discussing contractual and insurance protection for toll fraud.

**12.** The record compiled as a result of the en banc hearing emphasized that toll fraud is a crime, that it is difficult to prosecute, that it migrates from one area of telecommunications to other areas as detection and prevention methods become effective, and that additional consumer education is necessary to detect and prevent toll fraud. Witnesses pointed out that because there is no specific federal legislation regarding toll fraud, prosecutors must deal with the limited effectiveness of the existing criminal statutes.[28] The record also indicates that the criminal prosecution of toll fraud perpetrators is infrequent. Law enforcement representatives on the panels asserted that this may be partially due to lack of training or familiarity with toll fraud cases on the part of law enforcement agents or U.S. Attorneys. It also may be due to the high dollar thresholds (victims must allege large monetary damages) set by the U.S. Attorneys because toll fraud cases generally are manpower intensive but often result in either suspended sentences or short incarcerations. Further, to establish access device fraud under 18 U.S.C. Section 1029 the prosecution must show that a person's account has been accessed. In many toll fraud cases, particularly cellular tumbling,[29] no account is accessed. Rather the fraud perpetrator changes both the identification number and the telephone number in order to confuse the cellular switch. Our day-long en banc hearing demonstrated that a plan to combat toll fraud must include an integrated program of detection, prevention and prosecution. The record in the toll fraud en banc hearing also brought out comments about PBX fraud,

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[27] The Exchange Carrier Standards Association has recently been renamed the Alliance for Telecommunications Industry Solutions.

[28] According to the U.S. Secret Service most federal criminal investigations of toll fraud are undertaken pursuant to the Access Device Fraud statute, 18 U.S.C. Section 1029, which was enacted to stop credit card fraud. The Secret Service estimates that as few as thirteen states have enacted statutes specifically dealing with telephone fraud crimes.

[29] See infra paragraph 33.

payphone fraud, cellular fraud, and other types of fraud which we describe below at paragraphs 14 through 40, infra.

**13.** Comment Requested. In light of the persuasive testimony presented at the hearing, we request comment on specific ways to achieve closer and continuing coordination among the institutions fighting toll fraud. We seek comment on whether the Commission can add value to existing inter-institutional efforts, and, if so, how. We ask whether the Commission should establish a new Federal Advisory Committee representing all affected interests, to recommend specific solutions. Further, we request comment on whether to join with law enforcement authorities in encouraging Congress to enact legislation that clearly defines and penalizes this criminal activity and gives law enforcement the tools it needs to track and prosecute perpetrators of toll fraud. We invite proposals of specific statutory language that would achieve these objectives. Additionally, we request comment on ways to broaden established Commission and industry consumer education initiatives in order to better educate consumers about toll fraud risks and remedial steps that can be taken.

### *B. PBX Fraud*

**The Pacific Mutual Proceeding**

**14.** Petition and Comments. Pacific Mutual Life Insurance Company (Pacific Mutual) filed a petition requesting the Commission to declare ambiguous and unlawful tariff provisions under which AT&T has held petitioner liable for payment of toll fraud charges incurred because of interstate, interexchange telephone calls made through remote access to petitioner's on-premises PBX. In addition, Pacific Mutual requests the Commission to establish policies and rules to allocate the costs of remote-access toll fraud among users, carriers, and suppliers, and to promote effective anti-fraud measures.[30] AT&T filed an opposition to the petition, 19 parties filed comments and 16 parties, including AT&T, filed reply comments.[31]

**15.** All commenters who support the petition state that they have been victims of toll fraud. Two commenters state that they relied on AT&T to supply the CPE and establish protocols for that equipment.[32] Perkin-Elmer Corporation (PE) states that it relied on AT&T alleged misrepresentations or failure to warn of toll

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[30] Public Notice, DA 91-284 (March 14, 1991).

[31] See Appendix C for a list of commenters and abbreviations used throughout this NPRM to refer to these commenters.

[32] See Comments of AVNET and Mitsubishi.

fraud risks associated with use of the equipment. Several commenters, including Chartways, state that fraudulent usage had originated from company-owned, on-premises CPE.[33] Credit Card Calling Systems, Inc. stipulated that the fraud of which it was a victim involved unique features of overseas resale of AT&T 800 services connected to a PBX, enabling customers to call inward to the U.S. from overseas. In contrast, AVNET stated that it was a victim of fraud involving the use of its software defined network (SDN).

**16.** Those commenters supporting the petition propose that the Commission prescribe guidelines that provide incentives for the development and proper use of safeguards to prevent non-card toll fraud. Most commenters who support the petition concur that the carriers are in the best position to monitor traffic patterns and call volume.[34] Many commenters concur with the comments of Securities Industries Association, et. al. (SIA), which proposes that the Commission require interexchange carriers (IXCs) to offer, at cost-based rates, services designed to help users prevent, and react quickly to fraud. Most commenters agree that new technologies will increase opportunities for fraud. Commenters also believe that new technologies such as multiple node virtual networks using many PBXs and other sophisticated network terminating equipment will make the impact of fraud more serious.

**17.** Specifically, in its comments supporting the petition, Aeronautical Radio, Inc., (ARINC), asserts that the airlines are substantial users of telephone carriers' switched voice services and many have been victimized by remote access-based toll fraud like the fraud described by the petitioner. ARINC requests that the Commission prescribe network-based preventive measures and require carriers to inform their customers about the potential for toll fraud. ARINC asserts that policies and guidelines should accomplish the following four objectives: 1) toll fraud prevention (carriers' detection and prevention plans); 2) prompt remedial action (detect and remedy in timely manner); 3) limited customer liability (forgive charges incurred in at least the first two billing cycles in which fraud is detected); and 4) notification and disclosure (carriers warn customers of vulnerabilities).[35] PE alleges that unauthorized calls totalling $250,000 occurred despite the steps PE took to prevent fraud, including installation of additional access codes and reports of anomalous billings to AT&T Although AT&T assured PE that PE would be credited as a billing error, AT&T took two years to complete the investigation. PE

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[33] See e.g., Comments of Directel, Inc.

[34] See e.g., Comments of Broyhill, FMC, and Panel Concepts.

[35] See also Comments of CCCS, Inc.

contends that a carrier should not be permitted to limit liability unless the carrier has installed the best available techniques to detect and prevent remote access toll fraud; has advised customers, both in its tariffs and through marketing, of the vulnerability of its service offering; and has responded promptly to customer billing inquiries.

**18.** Similarly, SIA proposes that the Commission adopt specific guidelines in order to provide incentives for the development and proper use of safeguards by all affected parties to reduce toll fraud, and to spread losses equitably. SIA also proposes that the Commission require interexchange carriers (IXCs) to offer, at cost-based rates, services designed to help large users react quickly to toll fraud because the carriers are in the best position to monitor traffic patterns and call volume. SIA asserts that these services should include trunk-based monitoring against preset parameters and customized call blocking. Losses from fraud, SIA avers, could then be allocated between IXCs and customers based upon their respective responsibility. Carriers would be responsible if they fail to inform customers quickly of suspicious traffic (within 30 minutes if parameters are exceeded) or to restrict service when asked to do so On the other hand, customers would be responsible if they fail to obtain monitoring services or obtain them and fail to act upon carrier warnings. SIA asserts that because carriers have cracked down aggressively on card fraud, hackers have turned to CPE and non-card based fraud, and, under the present rules, IXCs have no incentive to help prevent or curtail non-card fraud.

**19.** In its comments, Western contends that carriers and vendors should be required to issue warnings and precautions to users and revise their tariffs to reflect their responsibility for toll fraud when customers have no direct control of detection or prevention of fraud and act responsibly with regard to their equipment. Further, Western proposes that the Commission amend Part 68 to require equipment vendors (1) to implement specific hardware and software functions to help prevent toll fraud and (2)to provide specific warnings and instructions to PBX purchasers regarding the toll fraud hazards and vulnerabilities inherent in their products. NATA argues that Section 68.110(b) of the Commission's rules requires disclosure when carriers take actions that affect the network. NATA argues that customers are entitled to adequate notice of technological changes in carrier networks because carriers have made it more likely that customers would experience fraud through their facilities and equipment. NATA submits that the carriers failed to provide adequate notice and should not now be permitted to reap the benefits of the violation and hold customers liable.

**20.** Many commenters oppose the petition and contend that the responsibility for unauthorized use of a PBX should be placed on the PBX owner These parties argue the PBX owner is in the best

position to prevent fraud by programming, configuring, disabling the remote access features, or installing adequate security or monitoring procedures.[36] Specifically, AT&T contends that the petition should be denied because the tariffs adequately establish customer responsibility and are enforced in a nondiscriminatory manner. AT&T contends that the rules petitioner proposes would eliminate the incentive for customers to secure their telephone systems and would encourage higher PBX fraud costs. AT&T asserts that the existing tariffs clearly require payment for Long Distance Service from all customers, whether usage was authorized or unauthorized, if the service originated from the customer's number. AT&T further asserts that it enforces its tariff in a uniform manner and only in cases where the fraud resulted because of AT&T's own fault as a carrier, or where a compromise would maximize AT&T's recovery does AT&T forgive any part of the disputed amount. AT&T argues that Pacific Mutual chose to use the remote access feature of its PBX, did not restrict the locations to which the PBX will permit remotely placed calls to be completed and therefore assumed the risk arising from interaction between its chosen systems and the network. In its reply comments, AT&T reiterates that it screens calling card calls because the individual database validation that is performed before each calling card call is completed enables AT&T to engage in screening and blocking functions which cannot readily be duplicated on non-card calls, where no such database validation occurs.

**21.** LiTel Communications, Inc. (LiTel) urges the Commission to deny petitioner's request regarding tariff issues because long-distance companies cannot distinguish legitimate PBX calls from fraudulent ones and would face enormous financial exposure if the tariff language is adjudged unlawful. MidAmerican concurs with AT&T in opposing the petition and contends that it is not in the public interest to make all consumers indirectly liable for PBX fraud. Southwestern Bell (SWB) contends that a cap on end user liability reduces the incentive for end users to prevent fraud. SWB submits that proposed restrictions on vendors through modification of Part 68 are vague. SWB also argues the proposed rules are unsupported because petitioner has not shown that end users lack either information or options necessary to guard against toll fraud.

**22.** Allnet submits that the comments in the proceeding have not adequately supported the granting of the petition because it is not the role of carriers to insure end users against theft of services. The theft of services, Allnet contends, was made possible by the end user's choice of equipment, its configuration, and its operation and only the PBX owner is able to know whether an outgoing call originated over an incoming line. Allnet asserts,

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[36] See e.g., Comments of MCI, LiTel, MidAmerican, SWB, and Ameritech at Appendix C.

however, that if IXCs are required to insure end users against theft, then IXCs should be permitted to refuse to serve high risk end users. Allnet proposes that minimum conditions should be set out in Part 68, including anti-theft features on all PBXs, real time on-line printing and monitoring of CDRs (call detail records), limiting direct inward systems access (DISA) trunks to 7 digit outpulse, purchasing account codes from IXCs, purchasing 800 call detail from IXCs, and mandatory 24 hour in-house attendant at each PBX control console or an automatic alarm algorithm that would page a PBX attendant who could shut down the PBX from a remote location. Further, Allnet contends that if IXCs are required to waive toll charges, local exchange carriers (LECs) should be required to waive corresponding access charges because it is unfair for IXCs to carry the burden of toll fraud, while LECs collect the underlying access charges.

**23.** In its reply comments, Bell Atlantic urges the Commission to deny the petition because when the Commission deregulated CPE 13 years ago,[37] it severed responsibility for CPE. Under this policy, the customer selects the CPE and its features, and in concert with the vendor, bears the risk if the CPE selected fails to meet expectations. Bell Atlantic, however, proposes that the Commission should encourage CPE manufacturers and vendors to work with carriers to develop solutions to prevent toll fraud and would cooperate fully in any such Commission-inspired efforts.

**24.** Comment Requested. Although we reached different results in Chartways, a PBX fraud case, and United Artists, a payphone fraud case, the dispositive element in each of these cases was where responsibility for the detection and prevention of fraudulent calling lay. In Chartways, the complainant had taken no discernible action to detect or prevent the fraudulent calling and the carrier had not acted negligently with regard to the calls. We therefore determined that the carrier could hold Chartways liable for the disputed charges. In United Artists, by contrast, the victim of the toll fraud had taken several reasonable steps to detect and prevent unauthorized calling, which nonetheless occurred. There, we concluded that the carrier had acted unlawfully in attempting to hold United Artists liable. If customers are unaware of potential liability, they are unlikely to take steps to limit their exposure. And, if carriers have no economic incentive to help customers limit their exposure, they are unlikely to invest in developing proactive solutions to PBX, or other, kinds of fraud. In light of the liability findings that resulted from the records in proceedings such as Chartways and United Artists, we tentatively conclude that tariff liability provisions that fail to recognize an obligation by the carrier to warn customers of risks of using carrier services are unreasonable.

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[37] In its comments, Bell Atlantic refers to Amendment of Section 64.702 of the Rules, 77 FCC 2d 384 (1980).

Moreover, we tentatively conclude that carriers have an affirmative duty to ensure that these warnings are communicated effectively to customers through for example, billing inserts, annual notices, or other information distribution methods.

**25.** We request comment on what other factors could or should be considered when liability determinations must be made.[38] Specifically, we seek comment on whether to apportion the cost of CPE-based fraud based on whether carriers, CPE owners, equipment manufacturers, or possibly others were in the best position to avoid, detect, warn of, or control the fraud. Further, we request comment on whether this apportionment should be based on a comparative negligence theory as proposed by Pacific Mutual and many commenters supporting its petition. We note that potential shared liability would require definition of the specific responsibilities of the CPE-owner to secure the equipment or communications system, of the manufacturer to warn of toll fraud risks associated with features of the CPE, and of the carrier to offer detection and prevention programs and educational services. We seek comment on what constitutes a failure to meet these responsibilities, on the nature of damages to be awarded to aggrieved parties, and on the appropriate forum to resolve these issues. For example, we request comment on whether arbitration or mediation should precede Commission involvement, and whether Commission involvement, if necessary, should begin with alternative dispute resolution or formal complaint proceedings. Further, we request comment on which party in a billing dispute involving allegations of toll fraud should bear the expense of arbitration. We also seek comment on whether residential ratepayers would bear the burden of business fraud by paying higher rates. Commenters should also discuss how carriers may recover charges for calling card fraud, where cardholder liability is limited to $50.00. See para. 38, infra.

**26.** Commenters are asked to address fraud prevention measures various parties might take. The record shows that carriers have increased fraud detection service offerings during the last 18 months. In light of our tentative finding that tariff liability provisions that fail to recognize a duty by the carrier to warn customers of risks of using carrier service are unreasonable, we ask whether a failure to offer services to limit customers' exposure should be considered an unreasonable practice. Consequently, we seek comment on whether to require IXCs and LECs to offer customers protection through monitoring services, on what basis those services should be offered, and whether such services should be part of the basic interexchange service offering. We also seek comment on whether there is software or equipment that

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[38] With regard to the reply comments of Bell Atlantic, we are not proposing to regulate carriers' provision of CPE, but rather carriers' imposition of charges for fraudulent interstate service.

customers should install in their CPE to prevent fraud. Further, we request comment on whether the programs offered by carriers such as MCI Detect, AT&T NetProtect and SprintGuard, designed to help businesses protect their CPE from toll fraud, include sufficient features as customer education, fraud detection equipment, traffic analysis, third party insurance, and real-time monitoring and detection. We seek comment on the availability of these programs to both large and small CPE owners, and their efficacy. In addition, we invite commenters to discuss in detail any other proposals or considerations relevant to liability determinations. We invite specific rule proposals for consideration.

### *C. Payphone Fraud*

**The Florida Petition**

27. In its petition, the Florida Public Service Commission (Florida PSC) requests that the Commission review tariff provisions governing liability for toll charges resulting from fraudulent third party calls where payphone providers have purchased originating line screening (OLS) and billed number screening (BNS) services from carriers.[39] The Florida PSC proposes that the Commission adopt regulations mirroring recently adopted Florida regulations.[40] The Florida regulations, which became effective February 3, 1993, release a pay telephone provider from liability for charges resulting from certain types of fraudulent calls if the provider purchases call screening for the line (OLS and BNS).[41] In addition to relieving payphone providers from liability, the Florida PSC rules require that the losses from fraud be allocated between the LECs and IXCs based on fault.[42] Further, the Florida

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[39] Originating line and billed number screening services inform operator service providers of any billing restrictions on its lines.

[40] Florida Administrative Code, rules 25-4.076, 25-24.475, and 25-24.515. Order No. PSC-93-0109-FOF-TP.

[41] The Florida approach was raised by a commenter in the OSP rulemaking proceeding, but was not examined substantively by the Commission because it was beyond the scope of that proceeding. See Report and Order, CC Docket No. 91-35, 6 FCC Rcd 4736, 4744-45 (1991).

[42] The Florida rule prohibits a company providing interexchange services or local exchange services from collecting from a pay telephone provider for charges billed to a line for calls that originated from that line through the use of 10XXX+0, 10XXX+01, 950-1/0XXX+0, or 1-800 access code, or when the call originating from that line otherwise reached an operator position,

PSC proposes that where a carrier does not accept or observe LEC OLS and BNS codes or fails to validate its calls via the appropriate LEC database, the carrier, not the payphone provider, should bear the costs of the resulting toll fraud under a uniform national policy. The Florida PSC argues that foreign carriers, through whom inbound international calls are initiated, have little or no incentive to validate calls because AT&T will bill the calls to payphone providers even though BNS could have been used to prevent the call from being completed.[43] The Florida PSC asserts that if AT&T were required to refuse payment to the foreign carrier for such calls, an incentive to validate will be created. The Florida PSC further contends that AT&T has insulated itself from this type of fraud at its own pay telephones.[44]

28. Comments. Many commenters favor a multi-jurisdictional or national application of the recently adopted Florida PSC rule limiting liability and apportioning liability based on fault.[45]

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if the originating line is covered by outgoing call screening and the call was placed after the effective date of the outgoing call screening order. The rule also prohibits a company providing interexchange services or local exchange services from collecting from a pay telephone provider for charges for collect or third number billed calls, if the line to which the call was billed was covered by incoming call screening and the call was placed after the effective date of the incoming call screening order. The rule further provides that any calls billed through the LEC or directly by the IXC, or through a billing agent, that have been identified as not collectible must be removed from any pay telephone provider's bill after the pay telephone provider gives notice of the fraudulent charges to the billing party and such notice must be provided to the LEC and IXC in writing no later than the due date of the bill. The LEC is responsible for charges that are associated with the failure of the LEC's screening services, and the IXC is responsible for charges that are associated with its failure to properly validate calls via the appropriate LEC data base.

[43] Florida PSC petition at 3.

[44] See Attachment at 27, Question No. 5, Florida PSC petition. The Florida PSC asks what disposition would be made of toll fraud charges if they had originated or terminated at an AT&T payphone. AT&T responds that "because of the differing status of AT&T payphones which are part of AT&T's network, the calls could not have occurred under the same circumstances."

[45] See e.g., Comments of IMR Capital Corporation, Indiana Payphone Association, Intellical, Inc., Louisiana Payphone Association, Midwest Independent Coin Payphone Association, Mississippi Public Communication Association, Minnesota Independent

Several commenters also propose that a federal rule should provide that if a payphone provider subscribes to international call blocking, the payphone provider would not be liable for international direct dial calls. Most commenters who support the petition contend that because LECs and IXCs are able to ensure the integrity of OLS and BNS they should be liable for fraudulent calls completed despite the use of screening mechanisms. In its comments, Minnesota Independent Payphone Association asserts that requiring payphone providers to unblock phones to provide the public with their choice of carriers increases the risk of fraud.[46] Many of the commenters supporting the petition contend that it was implicit in the equal access decision that payphone providers could rely on screening devices.

29. NARUC and the California Payphone Association contend that liability should attach to the entities that control the blocking and screening services and receive revenue from those services. Many commenters concur that the LECs and IXCs are much better able to absorb the costs of fraud than payphone providers because their cost is marginal cost, whereas the cost to the payphone providers is marginal cost plus mark-up, plus the cost of the ineffective screening services, plus the cost to contest the charges. Commenters representing payphone providers contend that the charges are both unfair and discriminatory because LEC and IXC payphones are not charged for fraudulent calls. Further, these commenters contend that classifying payphone providers as "customers" is illogical because payphone providers do not want or order the service that the fraud occurs on, and they take affirmative steps to prevent its delivery.

30. In opposition to the petition, many commenters contend that the emphasis of any fraud proposal should be on fraud prevention, not on the apportionment or assignment of liability. These commenters assert that apportioning liability after the fraud will not prevent fraud from occurring.[47] They claim that adoption

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Payphone Association, New Jersey Payphone Association, Inc., North Carolina Payphone Association, South Carolina Division of Information Resource Management, Utah Payphone Association, Arizona Payphone Association, California Payphone Association, Florida Payphone Association, Georgia Public Communications Association, GTE Service Corporation, and Independent Payphone Association of New York.

[46] Our operator service rules require only the unblocking of operator-assisted access, not direct-dialed (1+) access. See 47 CFR Section 64.704.

[47] See e.g., Comments of Sprint, Interexchange Carrier Industry Committee Toll Fraud Subcommittee, MCI, SWB, Ameritech, Bell Atlantic, BellSouth, and AT&T.

of the Florida PSC proposal would precipitate higher rates, and increased litigation before the Commission. Some argue that LECs do have incentives to fight fraud, as evidenced by their efforts to detect fraud and by increased competition in the local loop. Many commenters argue that equal access rules never were intended to make carriers insurers and guarantors because, if this were required, blocking and screening service fees would increase dramatically. These commenters further argue that increases in service fees would cause usage of the services to decline, with a net result that losses from fraud would increase. Moreover, these commenters argue, the payphone providers are not taking available fraud prevention precautions. They state that in some service areas, only a minority of payphone providers subscribe to blocking and screening services, and there is little demand from other aggregators.[48] These commenters further argue that Commission requirements for equal access did not project that screening services would be fool-proof protection against fraud and that before liability attaches, payphone providers should be required to do much more than merely subscribe to blocking and screening services. Many commenters propose that payphone providers should be required to purchase adjunct services, programmable phones, and special dial tones, and to locate their payphones where they can be observed. With regard to arguments by payphone providers that IXCs do not charge LEC or IXC phones for fraudulent calls, commenters argue that LECs and IXCs are not "customers."

31. Comment Requested. We agree with the Florida PSC that carriers should, as a general matter be held accountable for the services they provide. The Florida PSC rule which apportions liability based on fault accomplishes this general goal. We also find merit in the proposal by the Florida PSC that we review those portions of tariffs filed with the Commission that limit carrier liability associated with payphone fraud. Our decision in United Artists limited the payphone provider's liability where it took reasonable steps to limit its exposure to toll fraud because it was not a customer of the billing interexchange carrier. We tentatively conclude that payphone providers that take reasonable steps to limit their exposure to toll fraud and are not customers should not be required to pay bills generated as a result of toll fraud perpetrated through their equipment. We consider adopting the Florida approach but before adopting it as a national model, we are anxious to learn how it has worked in practice. We ask commenters to tell us whether the Florida approach has been an effective, efficient way of dealing with payphone fraud. We seek comment on whether carriers should be required to modify tariff language limiting carrier liability for payphone fraud and how this modification would affect carriers and payphone providers. We also seek comment on the general availability of blocking and screening services, whether they are priced reasonably, what percentage of

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[48] See Comments of Bell Atlantic at 2.

payphone providers are using these services where they are available, and whether they are effective in reducing the risk of fraud.[49] Further, we seek comment on whether there are other services available to payphone providers that reduce the risk of fraud, or whether payphone providers can prevent the fraud. We request comment on whether a federal fraud policy based on the Florida model is necessary to apportion the costs of payphone fraud, or whether tariffs filed by carriers for blocking and screening services should be required to clearly articulate the responsibilities of the parties and apportion the costs of fraud incurred in the use of these services.

### *D. Cellular Fraud*

**32.** The fraudulent use of cellular telephones has become a serious industry problem that results in financial losses to consumers, and increases the cost of doing business for the cellular industry. While there is no official reporting system, the industry estimates that cellular carriers lose between $100 million and $300 million per year because of cellular fraud.

**33.** The three major types of cellular fraud are: subscription fraud; stolen phone fraud; and access fraud. Subscription fraud occurs when someone subscribes to cellular service with fraudulent information or false identification and with no intention to pay for service. Stolen phone fraud involves the unauthorized use of a phone stolen from a legitimate customer before that customer can report the theft. Access fraud involves the unauthorized use of cellular service through the tampering, manipulation or programming of a cellular phone's Electronic Serial Number (ESN)[50] or Mobile

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[49] In our Order on Further Reconsideration and Further Notice of Proposed Rulemaking, Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, 8 FCC Rcd 2863 (1993), we requested comment on whether to require BNS and OLS services to be tariffed at the federal level, whether these services should be available unbundled, to all customers, and at reasonable rates, and whether to require LECs to extend their international blocking services to non-aggregator business and residential subscribers. With regard to the issue of BNS and OLS, the record in this proceeding reflects that the LECs generally oppose federal tariffing of these services because these services are traditionally provided through state tariffs. The record in this proceeding also indicates, however, that existing state tariffed screening services are not uniform and are frequently not available to all classes of aggregators.

[50] The ESN is a 32 bit binary number that uniquely identifies a mobile station to any cellular system for billing and other purposes.

Identification Number.[51] Access fraud represents the most sophisticated of the three types of fraud and the most serious in terms of dollars lost. There are two major types of access fraud: tumbling, and counterfeiting or cloning. In tumbling, an unauthorized user either randomly or sequentially changes the ESN or MIN after every call, thereby confusing a cellular system switch long enough to complete a call. Counterfeiting or cloning fraud occurs when an unauthorized user programs a valid subscriber MIN/ESN match into a phone. The unauthorized user then uses the cloned phone until detected. While recent developments involving pre-call validation[52] greatly reduce the amount of fraud due to tumbling, cloning fraud continues to grow at a rapid pace. The Secret Service estimates that altered or cloned cellular phones are becoming as common as fake identification cards, and are the instruments of major crimes such as drug-trafficking.

34. Comment Requested. In Revision of Part 22 of the Commission's rules governing the Public Mobile Service (Notice of Proposed Rulemaking), 7 FCC Rcd 3658, 3741 (1992), we proposed a rule to help reduce cellular fraud caused by tampering with the ESN.[53] The proposed rule establishes additional technical specifications for mobile equipment to prevent tampering with the ESN. We now seek comment on what further efforts on the part of the cellular industry, manufacturers, vendors, law enforcement agencies, and the Commission would aid in combatting cellular fraud. We seek comment on whether the Commission should consider stricter measures where cellular fraud occurs, and if so, what measures the Commission should consider.[54] We recognize that certain types of cellular fraud could be included in the CPE-Based

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[51] The MIN is a 24 bit number that corresponds to the seven digit directory telephone number assigned to a mobile station.

[52] Pre-call validation occurs when the cellular switch compares an incoming caller's ESN/MIN number against a subscriber database before the call is completed.

[53] See Proposed Section 22.929 which provides that each mobile transmitter must have a unique ESN that must be factory set, and must not be alterable, removable or otherwise able to be manipulated in the field. This proposed rule requires that the ESN host component must be permanently attached to a main circuit board of the mobile transmitter and the integrity of the unit's operating software must not be alterable. Finally, the cellular equipment must be designed so that any attempt to remove, tamper with, or change the ESN chip will render the mobile transmitter inoperative.

[54] See Section 503(b)(5) of the Commission's rules that provides for forfeiture proceedings against non-licensees or non-applicants who willfully or repeatedly violate the Commission's rules.

Fraud category. We, therefore, request comment on how the issues raised above in our discussion of CPE-based fraud should be resolved in the context of cellular fraud. Specifically, are adequate incentives in place for industry to develop anti-fraud solutions, or should new initiatives be chartered by the Commission? Is a shared liability theory for cellular fraud appropriate? Is unique criminal legislation necessary? Should labeling requirements be adopted? Comments should also present detailed proposals or alternatives to address cellular fraud.

### *E. Line Information Database (LIDB) Fraud*

**35.** A LIDB is a line information database created by an individual local exchange carrier.[55] LIDB service enables customers such as interexchange carriers to query the database to determine whether a LEC joint use calling card[56] is valid for use, or whether a particular telephone number can accept collect or third-party billed calls, before transmitting any call using that card or line number. Each database can be accessed by other LECs, IXCs and other customers to obtain data on the account status of LEC joint use calling cards, as well as information on line numbers, such as third party billing or collect call restrictions. This information is stored in the LIDB and updated by the LEC on a regular basis.[57]

**36.** Comment requested. As the owners of the database, it might be assumed that the LECs are able to detect fraudulent use, such as billing to restricted numbers or unauthorized credit card use. However, LIDB customers have an obligation as well; if a LEC card is offered for billing, the IXC or operator service provider (OSP) should query the LIDB to determine whether the card is valid for use. If the customer queries the LIDB each time the card is offered for payment, the LEC is able to detect high spikes of usage, i.e., multiple validation queries to the LIDB in a short

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[55] See Local Exchange Carrier Line Information Database, CC Docket No. 92-24, FCC 93-400, 8 FCC Rcd [ ] (1993) (LIDB Investigation Order).

[56] LEC joint use calling cards bear account numbers supplied by a LEC, are used for the services of the LEC and an IXC, and are validated by access to data maintained by the LEC. See Second Report and Order, Policies and Rules concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, 8 FCC Rcd 4478, 4478 fn.5 (1993).

[57] In the recent LIDB Investigation Order, the Commission investigated 10 LIDB databases offering validation services. The record indicates that these databases are updated 24 hours a day, seven days a week, and that each LEC offering LIDB validation services also has a fraud control program.

time period, prompting the LEC to investigate and then to determine whether it should deactivate the card. However, the fraud does not always consist of multiple calls within a short period of time and, therefore, may not be detectible by the LEC. For example, the fraud might consist of one call of long duration. In addition, the fraud perpetrator might discover the usage spike set by the LEC and place calls in such a manner that the LEC would not immediately detect the fraud. The LECs assert that detection of usage spikes is the only mechanism available for detecting fraud associated with the LIDB.

**37.** It has been alleged that losses from calling card fraud would be substantially reduced if the LEC had access to the calling number and the called number from the IXCs, as those numbers provide information on the origination and termination points of the call. This would allow the LEC to identify a call originating from or going to an area associated with fraud problems. This information would assist the LECs in developing a customer calling pattern profile that could be accessed in a case of suspected fraud. We seek comment on whether the carriers querying LIDB should provide the LECs with the originating calling party number and the called numbers. Commenters are also requested to explain how the presence or absence of this information should affect any decision concerning the allocation of liability for toll losses, and whether carriers should be permitted to charge for the provision of this information.

**38.** Under the Truth in Lending Act and Federal Reserve Board regulations, cardholder liability for unauthorized use of calling credit cards is limited to $50.00.[58] Therefore, when a card number is stolen or used without the cardholder's knowledge or permission, the LECs and their LIDB customers (IXCs, OSPs) must decide between themselves who will bear the cost of the uncollectible toll revenues. Of course, cardholders are under an affirmative obligation to report lost or stolen credit cards immediately, and to protect against theft of their card numbers. In the LIDB Investigation Order, the Commission required the LIDB providers subject to that investigation to include in their tariffs certain minimum procedures to help reduce the number of fraudulent calls.[59] However, the Commission left open the issue of liability for toll fraud losses that results from LEC provision of erroneous LIDB information.[60]

**39.** Assignment of liability for toll losses among LIDB providers and LIDB customers raises two concerns that should be

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[58] 15 U.S.C. § 1643; 12 C.F.R. § 226.12(b)(1).

[59] LIDB Investigation Order, 8 FCC Rcd at ¶¶ 19, 27-34.

[60] Id. at ¶¶ 29-30.

addressed. First, there may be many different fact patterns each time a loss is generated, making the development of a general rule difficult. In addition, limitation of liability provisions have long been accepted by the courts in the absence of willful misconduct or gross negligence.[61] Consequently, clauses limiting a carrier's financial liability to the cost of the service are found in virtually all common carrier tariffs. While the carrier's customers in this case are likely to have a sophisticated understanding of the risks of credit card fraud, LIDB providers should have incentives to make LIDB as effective as it can be. We seek comment on whether these limitations of liability should be permitted to shield the LECs from responsibility for toll losses incurred when a joint use calling card is used to bill fraudulent calls or whether the Commission should establish a rule for allocating liability for toll losses. Commenters are also requested to comment on whether such liability should be described in the LECs' tariffs.

### *F. Other Proposals and Request for Comment*

40. In addition to proposals already made herein, we propose to amend Part 68 of the Commission's rules to require equipment manufacturers to provide warnings regarding the potential risk of toll fraud associated with use of equipment.[62] We further propose that the warnings be prominent and conspicuous and included in any instruction manual or other literature accompanying the equipment, and on the exterior packaging of the equipment. Further, we propose that the warning in the instructional manual or literature discuss the customer's financial exposure and measures available to limit that exposure. We also propose in the case of PBX and similar equipment, if default codes are set by the manufacturer, vendor, or carrier, those codes must be fully explained in the instructional manual or literature and must explain the risks of using the equipment without modifying these default codes. We seek comment on specific language of warnings, whether warnings should be required for only newly registered equipment or whether they should be required for all telephone equipment already registered pursuant to Part 68. We also seek comment on whether the Commission should adopt standards for determining whether FCC registrations for any classes of particularly risk-prone equipment should be revoked, or whether warnings should be required as updates to manuals currently in use. Further, we seek comment on how others in the manufacturing and distribution chain of telephone equipment could warn consumers of the risks of fraud.

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[61] See, e.g., Western Union Telegraph Company v. Esteve Brothers & Co., 256 U.S. 566, 571 (1921); Primrose v. Western Union Telegraph Co., 154 U.S. 1 (1894); Robert Gibb & Sons, Inc. v. Western Union Telegraph Co., 428 F.Supp. 140 (D.N.D. 1977).

[62] See Proposed Rule at Appendix E.

41. Many comments filed in response to the en banc hearing, the Pacific Mutual proceeding, and the petition of the Florida PSC conclude that carriers need to incorporate more safeguards into their network operations to protect against and detect instances of toll fraud and abuse. For example, in its comments, Science Dynamics Corporation (SDC)[63] explains that it develops products for carriers that can curb or eliminate some sources of toll fraud. SDC manufactures a device that controls inmate access to the telecommunications network, and a system that monitors toll usage by predetermined customers and places a cap on long distance usage over a monthly billing cycle. Many commenters contend that such solutions that would minimize the fraud problem are available; however, they argue that as long as the regulated carriers do not have to absorb directly the losses attributable to fraud, carriers have little incentive to invest in preventive systems. The issue has been raised regarding LEC and IXC incentives to prevent fraud in light of their billing and collection arrangements. We request comment on whether incentives that the telecommunications industry has to initiate anti-fraud solutions can be strengthened, and what other actions the Commission should take to further fraud prevention. We also seek comment regarding network changes which could influence toll fraud detection or prevention. Specifically, we request comment on how, when, and where a carrier should release such information when it makes a network change.

## IV. CONCLUSION

42. The Commission's obligation to regulate interstate telecommunications services so that the public has rapid and efficient service at reasonable rates requires that our policies keep pace with rapidly changing technology and industry structure. In this Notice of Proposed Rulemaking, we request comment on the questions and proposals set forth above, the proposed rule set forth in Appendix E, and encourage participation by interested parties. The purpose of this rulemaking is to develop effective and efficient measures to address both existing and developing toll fraud problems, without hindering the development of new technologies that provide benefits to the public.

## IV. PROCEDURAL MATTERS

43. Initial Regulatory Flexibility Act Analysis on the Notice of Proposed Rulemaking and Ex Parte Rules

**Ex Parte Rules - Nonrestricted Proceeding**

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[63] See Comments of Science Dynamics Corporation (SDC). Pacific Mutual proceeding.

This is a nonrestricted notice and comment rulemaking proceeding. Ex Parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. Sections 1.1202, 1.1203 and 1.1206(a).

**Objectives.**

This rulemaking proceeding is initiated to develop effective and efficient measures to address toll fraud problems. The Commission requests comment on proposals to achieve closer coordination between the industry, consumers, vendors, law enforcement agencies, Congress, and the Commission to aid in the detection and prevention of toll fraud; improve consumer education initiatives by the Commission, consumer groups, and the telecommunications industry; determine that tariff liability provisions that fail to recognize an obligation by the carrier to warn customers of risks of using carrier services are unreasonable; establish a federal policy assigning liability for payphone fraud; and codify a requirement for written warnings for all telecommunications equipment registered under Part 68.

**Reporting, Recordkeeping and Other Compliance Requirements**

The actions proposed in this Notice of Proposed Rulemaking may affect large and small common carriers, manufacturers of equipment registered under Part 68, and CPE owners. It is not estimated that the burden of including warnings with the filing of Part 68 registration applications will be a significant economic burden on manufacturers. It is not estimated that the burden of including warnings in tariff filings or in billing inserts will be a significant economic burden on subject common carriers.

**Description, Potential Impact, and Number of Small Entities Involved**

The proposals discussed in this Notice of Proposed Rulemaking primarily could affect the degree to which small businesses are responsible for charges associated with fraudulent calls made over their equipment. The Secretary shall send a copy of this Notice of Proposed Rulemaking including the certification to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(A) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1981).

**Any Significant Alternatives Minimizing the Impact of Small Entities Consistent with the Stated Objectives**

The Notice of Proposed Rulemaking solicits comments on a

variety of alternatives to achieve Commission objectives.

**Paperwork Reduction**

The proposals suggested impose filing requirements on entities already required to file Part 68 and tariff filings.

**Comment Dates**

Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **January 14, 1994,** and reply comments on or before **February 10, 1994.** To file formally in this proceeding, interested parties must file an original and four copies of all comments, reply comments, and supporting documents with the reference number **"CC Docket 93-292"** on each document. If interested parties want each Commissioner to receive a personal copy of comments, interested parties must file an original plus nine copies. Interested parties should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street, N.W., Washington, DC. Copies of comments and reply comments are available through the Commission's duplicating contractor: International Transcription Service, Inc. (ITS, Inc), 2100 M Street, N.W., Suite 140, Washington, DC 20037, (202) 857-3800.

## V. ORDERING CLAUSES

**44.** Accordingly, IT IS ORDERED, pursuant to 47 U.S.C. Section 154(i) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), that NOTICE IS HEREBY GIVEN, of the proposed regulatory action described above and in Appendix E and that COMMENT IS SOUGHT on these proposals.

**45.** The Secretary shall serve a copy of this Notice of Proposed Rulemaking on the Small Business Administration.

**FEDERAL COMMUNICATIONS COMMISSION**

William F. Caton
Acting Secretary

**APPENDIX A**

**LIST OF COMMENTERS**
File No. 93-TOLL FRAUD-01

800-Software*
ADT Security Systems*
Advanced Environmental Technology Corporation*
AgriBank*
Alexander & Alexander*
American Hospital Association
American General Life Insurance Company*
American Hotel & Motel Association
American Petroleum Institute
American Re-Insurance Company*
American Service Life Insurance Company*
American States Insurance Companies*
American Tobacco Company, The*
Ameritech Operating Companies, The
Angelica*
Arthur Andersen & Co, SC*
Associates Bancorp, Inc.*
Ball Corporation*
BCS Financial Corporation*
Beaumont/William Beaumont Hospital*
Bell Atlantic Network Services, Inc.
Bell & Howell*
Bellcore/Bell Communications Research
Blue Shield of California*
BMD Incorporated*
Bowling Green State University*
Brown Brothers Harriman & Co.*
Brunschwig & Fils, Inc.*
Burns Clinic*
Call Interactive*
Cape Cod Five Cents Savings Bank*
CareerTrack*
Carolina Steel*
Carpenter Technology Corporation*
Cellular One*
Certified Vacations*
Chandler (U.S.A.), Inc.*
Chattanooga Publishing Company*
Chris Rhoda, Thomas College*
Clark Memorial Hospital*
College of Eastern Utah*
Colonial Insurance Company of California*
Consolidated Communications Public Services
Cooper Crouse-Hinds*

*** Informal Comments**

Copley Hospital*
Corning Credit Union*
Corning Incorporated*
Courtalds Aerospace*
Craig Hospital*
Crocker Fels*
Dairy Queen*
Dearborn Financial Publishing, Inc.*
Delta Faucet Company*
Department of Labor, State of New Jersey*
Desert Mutual Benefit Administrators*
Dillard Paper Company*
Directel, Inc.
Diversey Corp.*
Drackett Company, The*
Dresser-Rand*
Dunkin Donuts*
Dupont*
Dutko & Associates
Electro Rent Corporation*
Employers Benefit Association*
Employers Health Insurance/Lincoln National Corporation*
Energy Management Associates*
Energy North*
Entenmann's, Inc.*
Ernst & Young*
Farm Bureau*
First National Bank*
FOG*
Frisbie Memorial Hospital*
Froedtert Memorial Lutheran Hospital*
Fulton State Hospital*
GE Lighting/Worldwide Customer Service Center*
Gemini/Gemini Consulting Company*
Grolier, Incorporated*
Group Health Cooperative*
Heinz U.S.A.*
Holyoke Mutual Insurance Company in Salem*
Home Depot, The*
Hughes, Inc.*
Huls America Inc.*
ICF Information Technology, Inc.
Illinois Masonic Medical Center*
IMR Capital Corporation
Indiana University*
Intellicall, Inc.
Invesco Funds Group Inc.*
IVAC Corporation*
Joint Township District Memorial Hospital

*** Informal Comments**

Jostens*
Laramie County Personnel*
Law School Admission Services*
LEGENT Corporation*
Liddell, Sapp, Zivley, Hill & LaBoon, L.L.P.
Martin Memorial Medical Center*
Mastercard International*
Matsushita Electric Corporation of America*
MCI Telecommunications
Media General, Inc.*
Mercy Healthcare*
Mercy Healthplan*
Merrimack College*
Metro-North Commuter Railroad/Metropolitan Transportation Authority
Metropolitan Federal Bank*
Metropolitan Pier and Exposition Authority*
MHG Memorial Hospital*
Middlesex Community College*
Milbank, Tweed, Hadley & McCloy*
Minnesota Mutual Life*
Moore Research Center*
Morgan Stanley * Co., Inc.*
Motorola Communications and Electronics Inc.*
National American Life*
National Grange Mutual Insurance Company*
National System 75/DEFINITY and/or the DEFINITY/85 Users Groups
National Wildlife Federation*
NCR Corporation*
North American Telecommunications Association
Northrup King Co.*
Norwest Banks*
Oakwood Homes Corporation*
OBICI Hospital*
Ohio Motorists Association*
Olin Corporation*
Organization for Economic Cooperation and Development
O'Sullivan Corporation*
Pacific Service Employees Association and Credit Union*
Pacific Telesis Group-Washington
Payco American Corporation*
Pier 1 Imports*
Pioneer Hi-Bred International, Inc.*
Prince*
Proctor & Gamble*
Provo, The City of Provo, Utah - Division of Facility Services*
Prudential, The*
Qualicomm Incorporated*
Ralston Purina Company*
Rhode Island School of Design*
Richardson Electronics, Ltd.*

*** Informal Comments**

Rudnick & Wolfe*
Ryerson*
Saint John's University*
Schneider National*
Science Applications International Corporation*
SCRA/Trident Research Center*
Scudder, Stevens & Clark, Inc.*
Sedgwick James*
Sola Optical USA, Inc.*
Sony Music Entertainment Inc.*
Southwest Missouri State University*
St. Lukes Midland Regional Medical Center*
St. Lukes/Roosevelt Hospital Center
State Farm Insurance Companies*
State of Washington, Office of the Administrator for the Courts*
Stinson, Mag & Fizzell*
Stonehill College*
Stormont-Vail Regional Medical Center*
Switchcraft, A Raytheon Company*
Teepak*
Telesector Resources Group/NYNEX Telephone Companies
Texas Farm Bureau*
Thermo Electron*
TRIAD Chemical*
Union Camp*
United States Leasing International, Inc.*
United Way of Massachusetts Bay*
University of Kansas, The *
University of Oklahoma, The*
US West, Inc.
Utilities Telecommunications Council
VSA, Inc.*
Wahlco Engineered Products, Inc.*
Walgreens/Walgreen Co.
Washington Education Association*
Weichert Realtors*
Wellman, Inc.*
West Publishing Company*
Westvaco/Envelope Division*
Winnebago Industries*
W.L. Gore & Associates, Inc.*
Wm. C. Brown Communications, Inc.*

***Informal Comments**

**APPENDIX B**

En Banc Hearing
October 9, 1992

Panel No. 1: PBX and Other CPE-Based Fraud

A. PBX/CPE Owners:
   1. Leucadia National Corporation - Thomas E. Mara and Geoffrey Williams
   2. Agway, Inc./International Communications Association - Lawrence J. Gessini

B. Law Enforcement Expert: Detective Robert Synder, Columbus, Ohio Police Department

C. Equipment/Software Manufacturer on Vulnerabilities and Solutions: Northern Telecom - John Losier

D. New Anti-Fraud Services: LDDS Communications, Inc. - Don Chessher

Panel No. 2: Network-Based Toll Fraud, Responsibility, and Liability Questions

A. Hacker Expert: William J. Cook, Esq.

B. Fraud Migration in the Network and Solutions: Toll Fraud Prevention Committee of the Exchange Carriers Standards Association - Mary Chacanias (Bell Atlantic) and Bill Sushon (AT&T)

C. Payphone Manufacturer on Equipment-based Solutions: Intellicall, Inc. - B. Reid Presson

D. LIDB and Blocking/Screening Services: Bellcore - Jim Frankowski

Panel No. 3: Emerging Technical, Law Enforcement, and Business Solutions to Domestic and International Toll Fraud

A. New Anti-Fraud Products: Votan Div./MOSCOM Corp. Dr. Steven Gill

B. Law Enforcement Expert on Detection and Prevention of Fraud: U.S. Secret Service - Robert H. Rasor

C. International Representative: Stentor Telecom Policy Inc. (Canada) - Bernie Galarneau

D. Negotiation of International Fraud Disputes: Stuart N. Brotman

E. Contractual and Insurance Protection:
   1. Sprint - Robert F. Fox
   2. MCI - Edward J. O'Malley
   3. AT&T - Peter Coulter
   4. Travelers Corp. - Frank Scheckton, Jr.

## APPENDIX C

### LIST OF COMMENTERS
Pacific Mutual Proceeding

Aeronautical Radio, Inc. (ARINC) *
Allnet Communications Services (Allnet) **
Ameritech Operating Companies (Ameritech) **
AT&T *
AVNET, INC. (AVNET)
Bell Atlantic Telephone Companies (Bell Atlantic) **
Broyhill Furniture Industries, Inc. (Broyhill) **
Chartways Technologies, Inc. (Chartways)
Credit Card Calling Systems, Inc. (CCCS)
Directel, Inc. (Directel)
FMC Corporation (FMC) **
LiTel Telecommunications Corporation (LiTel)
MCI *
Maison Blanche Department Stores (Maison Blanche)
Metro-North Commuter Railroad Company (Metro-North)
MidAmerican Communications Corporation (MidAmerican)
Mitsubishi International Corporation (Mitsubishi)
North American Telecommunications Association (NATA) *
Pacific Mutual **
Panel Concepts, L.P. (Panel) **
Perkin-Elmer Corporation (PE) *
Science Dynamics Corporation (SDC)
SDN Users Association, Inc. (SDN)
Securities Industries Association, et. al. (SIA) *
Southwestern Bell Corporation (Southwestern)
Sprint **
Trailer Train Company (Trailer Train)
U.S. Travel Systems, Inc. (USTS) **
Western Diversified Services (Western) *

* Filed Reply Comments
** Filed Only Reply Comments

**APPENDIX D**

**LIST OF COMMENTERS**
File No. 93-TOLL FRAUD-02
The Florida Public Service Commission Petition

American Public Communications Council (APCC)*
American Telephone and Telegraph Company (AT&T)*
Ameritech Operating Companies (Ameritech)
Arizona Payphone Association (Arizona)
Bell Atlantic Telephone Companies (Bell Atlantic)*
BellSouth Telecommunications, Inc. (BellSouth)*
California Payphone Association (California)
Coin Phone Management Company (CPMC)
Florida Pay Telephone Association, Inc. (FloridaPTA)
Georgia Public Communications Association (Georgia)
GTE Service Corporation (GTE)*
IMR Capital Corporation (IMR)*
Independent Payphone Association of New York, Inc. (IPANY)
Indiana Payphone Association (Indiana)
Intellicall, Inc. (Intellicall)*
Interexchange Carrier Industry Committee Toll Fraud Subcommittee (TFS)
Louisiana Payphone Association
Midwest Coin Payphone Association
Mississippi Public Communication Association (Mississippi)
Minnesota Independent Payphone Association (MIPA)
MCI Telecommunications Corporation (MCI)*
National Association of Regulatory Utility Commissioners (NARUC)
New Jersey Payphone Association, Inc. (NJPA)
New York Telephone Company and New England Telephone and Telegraph (NYNEX)*
North Carolina Payphone Association (North Carolina)
South Carolina Division of Information Resource Management (SCDIRM)
Southwestern Bell Telephone Company (SWB)*
Sprint Communications Company L.P. (Sprint)*
United States Telephone Association (USTA)
Utah Payphone Association (Utah)

* Filed Reply Comments

## APPENDIX E

## Proposed Rules

Part 68 of the Commission's Rules and Regulations (chapter 1 of Title 47 of the Code of Federal Regulations, part 68) is proposed to be amended as follows:

**PART 68 - CONNECTION OF TERMINAL EQUIPMENT TO THE TELEPHONE NETWORK**

1. The authority citation for Part 68 continues to read as follows:

**Authority:** Section 4, 5, 303, 48 Stat. 1066, 1068, 1082 as amended; 47 U.S.C. 154, 155, 303.

2. Section 68.200 "Application for equipment registration" is proposed to be amended by adding a new subsection (l):

68.200 Application for equipment registration

***

(l) A prominent and conspicuous warning accompanying the equipment and included in any instruction manual or other literature accompanying the equipment and on the exterior packaging of the equipment which warns equipment users of the risks of toll fraud associated with the equipment and its specific features. The warning in the instructional manual or literature should discuss the customer's financial exposure and measures available to limit that exposure. In the case of PBX and similar equipment, if default codes are set by the manufacturer, vendor, or carrier, those codes must be fully explained in the instructional manual or literature and the warning required by this section must explain the risks of using the equipment without modifying these default codes.

**SEPARATE STATEMENT**

**OF**

**COMMISSIONER ANDREW C. BARRETT**

**RE: Policies and Rules Concerning Toll Fraud, CC Docket No. 93-292, Notice of Proposed Rulemaking (NPRM).**

Establishing regulatory policies to ensure effective detection and prevention of telecommunications fraud is a demanding task. This fraud takes many forms and is not amenable to a single or a simple solution. The problem must be attacked on a broad front, and will require concerted, ongoing and multi-faceted efforts by this Commission as well as other government and private entities.

This NPRM ably reflects these realities. It lays out the various types of fraud, and the problems and impediments that are barring effective solutions to the problem. It fashions an overall framework to approach the problem, and considers specific proposals targeted at each type of fraud. In doing so, it recognizes that fraud will migrate to new services and technologies as they develop, and as effective measures to combat existing types of fraud are devised. The Notice reflects the concerns and issues raised in the course of Congressional hearings on toll fraud. It also incorporates the record compiled as a result of the Commission's October, 1992 En Banc Hearing on toll fraud, and considers ideas that have been raised before the Commission in petitions filed by various parties.

I am particularly interested in arguments that incentives to detect and prevent telecommunications fraud are directly related to liability for losses from fraud. That the bottom line is often the most effective motivator is only common sense. The Notice seeks comment on whether carriers should face liability for certain types of fraud depending upon whether they or some other party are in the best position to detect and prevent fraud. If the party or parties best situated to detect and control fraud bear some responsibility for losses, they are likely to implement effective responses to the problem.

We now seem to have a situation where parties are attempting to limit their liability, seeking to impose losses on others. This does not move us toward a solution. I believe tariff provisions that limit carrier liability and do not warn customers of fraud risks may be unreasonable and counterproductive from the standpoint of effective response to fraud. I will examine the record on

these issues with great interest, and urge commentors to devote careful attention to these questions.

This proceeding should mark the implementation of a more comprehensive and unified approach to the problem of telecommunications fraud. I expect The Commission will be able to take concrete and meaningful steps as a result.



*U.S. Government Printing Office: 1994 — 300-842/00007